

FRAUDULENT MORTGAGES

OF

MERCHANDISE.

A COMMENTARY ON THE AMERICAN PHASES

OF

TWYNE'S CASE.

BY

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Crescit in Orbe Dolus.

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PREFACE.

This commentary is an outgrowth of the controversy which has distinguished the investigation, in the American courts, of the questions of the legal characteristics of mortgages on stocks of goods in trade, with power of sale reserved to the mortgager, and of the legal *status* and relations of the parties to such transactions. It will doubtless be generally understood that no treatment of these questions could be of much value, which should attempt to present the law upon the subject without entering into the controversy. For this reason, no apology is deemed necessary for the controversial character of much of this commentary.

While entertaining decided views on the subject treated, the author has endeavored to present fairly those views of it with which he is not in accord, and to subject them to such criticism only as should tend to test their relation to the acknowledged fundamentals of our American jurisprudence. The difficulties which have caused the particular controversy are believed to lie deeper than its immediate subject. They have probably grown out of certain defective and erroneous views concerning the question of fraud as a question of jurisprudence, and more particularly fraud in conveyances considered in respect to the rights of those

not parties to such conveyances; views which characterized judicial decisions on the subject before mortgages on stocks of goods in trade because of frequent use. In the absence of well defined and clearly understood rules on the general subject of fraud in conveyances, it is not strange that there should be want of accord in regard to the class of conveyances here treated.

Was the statute of 13th Elizabeth, which made void as to third parties conveyances into which a fraudulent intent entered, creative of a new rule of law, or only declaratory of an old one? If declaratory did it announce exhaustively all the principles of the common law on the subject? Or were there other features sometimes found in conveyances, besides an intent to defraud, which ought to or might make them fraudulent as to third parties? Is the term fraudulent to be applied alone to the intent of the parties, or is it properly applicable to the transaction itself into which the parties have entered? Does the law look with more favor upon deceit which is not intended by those who fail to stop and calculate the consequences of their acts, than upon deceit which is anticipated and intended? Must jurisprudence place all such cases upon a Procrustean bed of "intent," and follow the fiction of imputing an intent where none exists? What is the character of the fraud which is adjudicated by the court in any such case, and is the degree of the fraud affected, limited or enlarged by the intent of the parties? In any such case, can the rule of jurisprudence be in any way affected, either in its scope or effect, or the manner of its application to the facts of the case, by the mode in which those facts are ascertained? May we use the terms "actual fraud," "con-

structive fraud," and "presumptive fraud," in discussing these questions; and if we do, should we apply these adjectives to the subject of fraud with any other than their usual and strict signification? How should we use the term "fraud in law," if used at all; and what do we mean by "fraud in fact"?

These are some of the questions which must be considered, and to which the legal sense of the profession must, by general accord, furnish clear and satisfactory answers, before the law upon the subject of fraud in conveyances can be said to be well settled. In the meantime, much discussion is inevitable, and doubtless treatises will be written and re-written on the general subject of fraud as a legal question, distinguished from fraud as a question of morals. This commentary is offered as a tentative contribution to the discussion.

MEMPHIS, January 1 1884.

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FRAUDULENT MORTGAGES OF MERCHANDISE.

CHAPTER I.

THE CONTROVERSY.

SECTION 1. The controverted questions.

2. The doctrine of *Robinson v. Elliott*.
3. Distinction between actual fraud and constructive fraud.
4. The dissenting doctrine of *Brett v. Carter*.
5. Twyne's case the origin of the American doctrine.

§ 1. **The controverted questions.** — Two questions in jurisprudence, arising in a class of cases of frequent occurrence, have been extensively agitated in the United States during the present century, the discussion of which has developed much radical difference of opinion. They are questions of fundamental or substantive law, whose settlement upon a basis satisfactory to all candid and inquiring minds is a matter of importance. If jurisprudence be to any extent a science, it is eminently desirable that such substantive rules as it has should be accurately ascertained and correctly formulated. It is the recognition of this truth which has led to and stimulated the discussion referred to.

These questions may be stated as follows: —

1. Is a mortgage of a stock of goods in trade, under which the mortgager is permitted by the mortgagee to sell

the goods at his discretion in the usual course of his business, inherently and essentially fraudulent as to creditors of the mortgager?

2. If it be, is it still so in case the agreement or understanding between mortgagee and mortgager, permitting such sales, is not shown upon the face of the mortgage, but is proven by evidence *aliunde*?

Growing out of these fundamental questions are other incidental or subsidiary ones, which are merely questions of procedure, but which have been often but improperly treated as questions of substantive law, and the discussion of which as such has sometimes led to a confused understanding of the extent of the rules of substantive law on the subject. Without at present stating these incidental questions, they may be classed as: *First*, those concerning the manner in which the facts shall be ascertained in controverted cases; and *second*, those concerning the sources, form, and quality of evidence admitted. It may be assumed that both these classes of questions relate merely to procedure, and that they should not be confounded with fundamental questions. The two inquiries above formulated will probably be accepted as a fair presentation of all the questions of fundamental law, or jurisprudence, which are involved in the controversy. The following pages have been written in the belief that a candid and impartial investigation finds both these questions answered in the affirmative by the great weight of American authority, considering the decisions not only as precedents, but as enunciations of principle.

§ 2. **The doctrine of Robinson v. Elliott.** — In the case of *Robinson v. Elliott*,¹ the Supreme Court of the United States was confronted with the duty of determining decisively for the first time, the first of these questions, upon

¹ 22 Wall. 513 (1874).

distinctively common-law principles.¹ The question having been already much controverted in America, would, it had been expected, be sooner or later presented to the Supreme Court for its consideration. Its answer in the affirmative commits that court to a doctrine which originated in England, but which, though exotic, has been so effectually transplanted, and has developed so extensive a growth in the soil of American jurisprudence, by reason of its adaptation to the peculiar exigencies of our commercial interests, that it may now be well characterized as American. Its tardy growth in England, a misunderstanding of its original scope and application, and a confusion of views as to the office and effect of certain early English statutes, had conspired to create many doubts in the minds of jurists, both as to the soundness of the English doctrine and the propriety of its *cis-Atlantic* application. The settlement of these doubts, it had been supposed, would be materially promoted by the enunciation of a rule on the subject by our highest tribunal. This result has been attained only in part, although the court threw the weight of its unanimous decision upon one side of the question. The controversy continues to such an extent as to suggest, and perhaps to justify, an attempt to explain and illustrate the question more fully than has yet been done, by examining closely the doctrine in question, inspecting its origin, tracing its growth, and testing its soundness.

It was decided in *Robinson v. Elliott* that a chattel mortgage upon a stock of goods in trade, which permits the mortgager to remain in possession of the property, and in its disposition by sale in due course of trade at his discretion, until the maturity of the debt purporting to be secured by it, is fraudulent as to other creditors, and is absolutely void as to them, without reference to the *bona*

¹ The question had been presented, but not adequately considered, in the earlier case of *Bank v. Hunt*, 11 Wall. 391 (1870).

fides of the mortgage debt, or to the intentions of the mortgager as to fraud. The leading features of the somewhat complex doctrine embodied in this decision, are, that fraud is a legal question, or a question to be adjudicated by a court upon evidence; that whether fraud be established in any case, depends not only upon the finding of the facts by a jury or by the court, but also upon the judgment of the law on the facts so found; that a necessary tendency to fraud, in a transaction such as that stated above, may be recognized by the courts, when the facts of the case are made known; that when such a tendency is recognized, the law characterizes such a transaction as inherently fraudulent; and that this is not a question for a jury to determine in any case, because it is not a question of fraudulent intent, nor is it in any other respect a question of fact. Whenever, therefore, it appears satisfactorily to the court, that by an agreement between the parties, the mortgager has been permitted to remain in possession of the stock of goods mortgaged, and to make sales thereof in the usual course of trade, the case is ready for an adjudication that the transaction is essentially fraudulent. The fact of such agreement may appear to the court from an inspection of the written contract; or it may be conceded by the parties as one of the facts of the case; or it may be established by the verdict of a jury; or be proven to the satisfaction of the court by evidence, in cases where no jury intervenes. But the manner in which the fact of such an agreement shall be established, is a question of procedure only; and the adjudication of fraud by the court, after the facts are established, is a matter of substantive law. It is in this sense that such mortgages have often been properly said by the courts to be fraudulent in law.

§ 3. Distinction between actual fraud and constructive fraud.—If this rule shall become well established, it

will result that our American jurisprudence must dispense with the old distinction between "fraud in law" and "fraud in fact," and must present a clearer and more accurate distinction between actual fraud and constructive fraud than the one heretofore employed, and, in general, a more philosophical classification of the protean shapes in which fraud is found lurking in fraudulent conveyances. It is plain that the fraud which distinguishes such cases as *Robinson v. Elliott*, if it be fraud at all, is in no sense constructive or presumptive fraud ; it is actual fraud, in as full a sense as if it had been evidenced by the fraudulent intent of the parties, and such intent were established by the verdict of a jury. By examining the objections which have been interposed to this doctrine, the student will see that the objectors very generally denominate it a doctrine of "constructive fraud ;" and this erroneous view is probably responsible for the greater part of the dissent from the doctrine. Constructive fraud is defined by Story¹ as meaning simply that by reason of the peculiar relations between the parties to a transaction, a suspicion or presumption arises that one party is taking or may secure an unfair advantage over another, and that this presumption, if not rebutted by proof, may result in setting aside the transaction as fraudulent ; but that proof of *bona fides*, or of absence of fraudulent intent, or of actual indebtedness not overstated, may suffice to rebut the presumption and validate the transaction. If it be true that, in the class of cases in question, courts which treat them as fraudulent do so upon a theory of presumption or of constructive fraud, then it logically follows that proof of honest intent, or of actual indebtedness, when offered, should be considered in determining the case, and that issues may often properly arise in such cases, which should be submitted to a jury. But if the logician wrongly assumes as a premise that the question is

¹ *Eq. Jur.*, sect. 258, 811.

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one of constructive fraud, his logic will lead him astray. It will appear on careful examination that such a premise is unwarranted. The question is not one of constructive fraud. There is nothing in such a case as *Robinson v. Elliott* which necessarily raises a suspicion of fraudulent intent, such as the suspected party should disprove or such as a jury must consider. There is no occasion for resort to presumption or construction. On the facts of such a case, as stated in the preceding section, there is an immediate and conclusive judgment of fraud. The fraudulent tendencies and features of the transaction form the basis of fact on which the judgment of the court rests; just as in cases turning on intent, the verdict or finding that such an intent exists, forms the basis of fact for the judgment or conclusion of the court. The facts being made apparent, the judgment of the law thereon is inevitable. The truth is, that "constructive fraud" is simply a convenient rule of practice, by which courts and juries are assisted in settling the facts in doubtful cases. In such cases, the law in effect says to the suspected party, "The circumstances are against you, and raise a presumption of fraud, which will cause a decision adverse to you unless you successfully rebut that presumption." No one doubts this to be a salutary rule in cases to which it applies. But it should be definitely and accurately understood, and should not be confounded with the rule in *Robinson v. Elliott*. "Constructive fraud" and "fraud in law" are not synonymous or convertible terms. "Actual fraud" and "fraud in fact" are not synonymous or convertible terms. "Actual fraud" and "constructive fraud" are antithetical terms, when properly applied. But the expressions "fraud in law" and "fraud in fact" are ambiguous, and when used antithetically, are misleading; and they might well be disused; for in every case of fraud, as well as in all other litigated cases, the elements of both law and fact are necessarily involved.

These preliminary observations may serve to illustrate the controverted questions to be now considered, and may assist in explaining, in part at least, the occasion for the controversy.

§ 4. The dissenting doctrine of Brett v. Carter. — In the present aspect of the controversy, *Brett v. Carter*¹ may be considered the leading case in opposition to the doctrine of *Robinson v. Elliott*. In this case, Lowell, J., of the United States District Court for Massachusetts, ventured “to doubt both the generality and justice” of the doctrine announced in *Robinson v. Elliott*, and dissented from it as a new doctrine of only local application. His opinion states so forcibly the leading objections offered to this rule of law, and is so boldly critical as to the decision of his superior tribunal, as to make it perhaps the best exponent of the views which it supports, and the best test which can be applied to the soundness of the doctrine in question.

Brett v. Carter was a bill in equity by an assignee in bankruptcy of the mortgagor, against the mortgagee of a stock of stationery. The debt was for the purchase-money of the stock of goods, sold by the mortgagee on a credit, the notes maturing at different times during four years. The mortgagor was permitted by his creditor to sell the goods in the ordinary course of his trade. It did not appear, however, that any provision to this effect was incorporated into the writings. This feature of the case must be observed, in view of the distinction which some jurists have taken, that in all cases where the provision allowing the debtor to sell the goods does not appear on the face of the instrument, but is shown by evidence *aliunde*, the court will not find fraud in law, but will leave it to the jury to find fraud in fact. The opinion of the court was, in part, as follows.

“The Court of Appeals of New York decided, by a bench

¹ 2 Low. 458; 3 C. L. J. 286 (1875).

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which was equally divided in opinion, that a mortgage of chattels which permits the mortgager to continue in possession and to sell the goods in the ordinary course of business, is void on its face as mere matter of law.¹ This decision has had a remarkable following, and its doctrine appears to have become the settled law of New York, Ohio, and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa; in several States it has not been passed upon. But as this new doctrine, or rather, revival of an old one, has been said by Mr. Justice Davis, of the Supreme Court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion. I had supposed it to be well settled, after much debate and conflict of opinion, certainly, but substantially settled, that when a vendor or mortgager was permitted to retain the possession and control of his goods, and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May in his valuable treatise on Voluntary and Fraudulent Conveyances, page 126,² and by the cases he cites; and by the learned edi-

¹ *Griswold v. Sheldon*, 4 N. Y. 581.

² *Query*, p. 106.

tors, both English and American, of Smith's Leading Cases.¹ By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, 1st, such as are expressly made so by statute; as, for instance, when a bankrupt retains the order and disposition of goods as apparent owner, with the consent of the true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the Supreme Court, *Sawyer v. Turpin*.² Or, 2d, where the act is necessarily a fraud on creditors; as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole of it to one antecedent creditor. These, to be sure, are examples; but very few others could be adduced; and I understand the true law, both here and in England, to have been, until lately, that a conveyance for a valuable present consideration is never a fraud in law on the face of the deed, and if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgager.

"It is very strange that after our legislatures have met the difficulties of Twyne's Case, by requiring registration, which gives not only constructive, but, in most cases, actual notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harsher doctrine, which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud. It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose; for if he can not sell in the ordinary course of trade, or only as the trustee

¹ Notes to Twyne's Case, vol. I., p. 1, etc.

² 91 U. S. 114.

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and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case, he never could have begun business, for the whole stock was supplied by the defendant.

“ I would refer in this connection to the very able opinions of Judge Dillon in *Hughes v. Cory*,¹ and of Judge Campbell in *Gay v. Bidwell*,² in which they refuse to follow the decisions in New York, and give reasons for that refusal, which, in my judgment, are unanswerable.

“ If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is, that this brings us to an ultimate fact of observation and experience; and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when they are told in the deed itself that the debtor has no credit, and no property that he can call his own, than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person’s old debts, the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given. Take this very case as an illustration. It is admitted that there was no fraud in fact; that the trader’s whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain instalments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage; but I am asked to find fraud in law, when I know, and it is admitted, there was none in fact.”

These positive views of Judge Lowell are stated with all the earnestness of conviction. To fully illustrate the character of the issue presented between him and the appellate

¹ 20 Iowa, 399.

² 7 Mich. 519.

court, it is only necessary to quote the equally incisive language of Mr. Justice Davis in *Robinson v. Elliott*,¹ in which case the stipulation allowing the debtor to remain in possession, control, and disposition of the stock of goods, appeared on the face of the instrument.

“ If chattel mortgages were formerly, in most of the States, treated as invalid unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing (the cases to the contrary being exceptional), conceded the right to the mortgager to retain possession, if the transaction is on good consideration and *bona fide*. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bona fide* mortgages of it, to secure creditors, without any actual change of possession.

“ But the creditor must take care, in making his contract, that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled by any process of reasoning, or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. It is not difficult

¹ 22 Wall. 513.

to see that the mere retention and use of personal property, until default, is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgager alone. The former is permitted by the laws of Indiana, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. We are not prepared to say that a mortgage under the Indiana statute would not be sustained, which allows a stock of goods to be retained by the mortgager, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged.

“ Manifestly it was executed to enable the mortgagors to continue their business, and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage;

for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

"In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage which in its very terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions."

The diversity of conclusions drawn in these two opinions, as to what is the English law on this subject, is no more striking than is the difference they disclose as to the duty of judicial opinion on the subject. The Supreme Court finds itself impelled to the conclusion that the transaction is inherently fraudulent, which is accordingly adjudicated. The District Court does not think it should have, or that

the law does have, any opinion on the subject. Yet the only substantial difference in the aspect of the two cases, as presented to the courts for adjudication, is in the character of the evidence by which the reserved privilege of selling the goods was proven. In *Robinson v. Elliott*, this reservation appeared on the face of the instrument. In *Brett v. Carter*, it appeared by evidence *aliunde*; but that it did appear is manifest from the facts stated in the opinion of the court. There was one entire transaction in each case. What the transaction was, appeared in one case partly by written and partly by parol evidence. In the other case, it was sufficiently shown by the written contract alone. But that this difference in procedure, as to the mode by which the agreement is proven, can furnish no reason for a difference in the application of the proper rule of law, will be clearly seen from the adjudicated cases.

§ 5. Twyne's Case the origin of the American doctrine.—The controversy will be best understood, not only as to its merits, but also as to its occasion, by a careful examination of the English cases, with a view of observing the origin and tracing the development of the doctrine in question. The visible origin of this doctrine is to be found in Twyne's Case.¹ It has come down to us with as little apparent variation from its original form as has any other of the principles announced in that case, while it is perhaps the most important of them all. The exhibitions of this doctrine, as an active force in the jurisprudence of this country, have been called American phases of that celebrated case, because the doctrine has been adopted into our jurisprudence in precisely the form announced in the Star Chamber in 1601, and finds a ready adaptation to the various exigencies of our jurisprudence. Singularly

¹ 3 Coke, 80.

enough, it is virtually outgrown and practically abandoned in England.

Attention is invited at the outset to the fact that it is not the mere question of the possession of the goods by the debtor that is now to be looked to as the leading question in that case.

It has too frequently been supposed that the chief and most important, if not the only, principle of law adjudications in Twyne's Case, was, that the retention of possession by the grantor of chattels conveyed by him, by mortgage or otherwise, as security for debt, would alone suffice to render the transaction fraudulent and void, as to his other creditors; and the idea has often been advanced that the principle of law adopted in that case was established upon the basis of a presumption of fraudulent intent, thus presenting a case under the statute 13 Eliz., c. 5. Both of these views, it is now submitted, were erroneous. Twyne's Case did not turn upon the question of retention of possession alone; nor was it necessary to the determination of that case to impute a fraudulent intent to the grantor in the conveyance, or to refer to the statute 13 Eliz., c. 5, for the rule of law which should govern the case.

It is in these misapprehensions as to the scope and effect of Twyne's Case, that the careful student of the law of fraud will find the occasion for all the various controversies that have arisen in reference to chattel mortgages, including the one now under consideration. Thus, in the earlier decades of the present century, there was waged in this country an earnest and learned controversy over these questions: 1st, whether retention of possession under such a mortgage is conclusively fraudulent; or, 2d, whether it is only *prima facie* fraudulent; and, 3d, if the latter, then what explanation of such possession will suffice to negative the suspicion of fraud. The disputants very generally took the view of Twyne's Case above stated. The learned

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American editors of Smith's *Leading Cases*, in their notes on Twyne's Case,¹ have given their chief attention to the question of possession, practically overlooking the one now under consideration. In a recent article in the *American Law Register*,² entitled "Sales and Conveyances without Delivery of Possession," the writer, taking up the subject where the editors of Smith's *Leading Cases* left it, like them treats retained possession alone as the important question in Twyne's Case.

The text-writers have very generally fallen into the same misapprehension. Mr. Cowen, in his note to *Bissell v. Hopkins*,³ where the rule was disaffirmed that retention of possession alone renders a mortgage of chattels fraudulent, criticises this rule, enumerates twenty-four exceptions thereto which he finds then already established by decisions in England and America, and asks: "What does the rule amount to? What is it worth? And does its preservation merit a struggle?"; adding, "Some of the exceptions are almost as broad as the rule itself." This rule is now abandoned in nearly all the American States, and the controversy over it is here referred to merely as an illustration of past misapprehensions concerning the scope of Twyne's Case; for it was that case to which reference was usually made for the origin of the rule; yet it cannot now be well supposed that that case was ever an authority for such a rule. The courts of a few of the States still adhere to this rule, probably because it became at an early day too well fixed in their jurisprudence to be disturbed, and not because it would now be advisedly adopted.

It is obvious, too, from the language of the opinion in *Brett v. Carter*, above quoted, that the court delivering

¹ Vol. 1, p. 47.

² 18 Am. L. Reg. 137 (1879).

³ 3 Cowen, 166; 15 Am. Dec. 259.

that opinion supposed Twyne's Case to have been decided upon rules of constructive or artificial fraud, probably by imputing to the parties a fraudulent intent; and considered that the applicability of these rules to such cases had been destroyed by modern statutes, and that the only fraud in fact of which courts take cognizance, is fraud existing in the intent of the parties, to determine which will of course usually require the verdict of a jury. It is further obvious that that court supposed the secrecy of the transaction to be the principal invalidating feature of Twyne's Case, a feature which would have been effectually removed by notoriety, and that this result has been fully accomplished for all similar cases in the future, by the modern statutes requiring registration of chattel mortgages; for registration gives "not only constructive, but in most cases actual notice," and thus meets all "the difficulties of Twyne's Case." But it is submitted that these views also rest in a grave misapprehension of the law of that case; that the secrecy of the transaction was not its worst feature; that the broadest notoriety, either constructive or actual, would not have made it a valid or legal transaction; that the fraud therein discovered was actual, not presumptive or artificial fraud; that it rested particularly, not in the intent of the debtor, but in the inherently fraudulent character and tendency of the transaction; and that for this reason, the case did not find its rule alone in the statute 13 Eliz., c. 5, but in the common law, which would have furnished an apt and adequate rule, without the statute.

Instances of this broader view of the characteristic elements of Twyne's Case are found in our American jurisprudence, even at an early day. Mr. Angell¹ observed the *indicia* of fraud in that case to be "that the vendor, after a bill of sale of chattels for a valuable consideration, re-

¹ Angell on Assignments, 80.

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mained in possession, and *exercised acts of ownership over the goods.*” Chancellor Lansing, in 1808, criticised the remark of Lord Mansfield, that “even before the statute,¹ if a man had conveyed his own goods to a third person, and had kept the possession, such possession would have been void, as being fraudulent according to the doctrine in Twyne’s Case, 3 Rep. 81,”² saying of it, “This opinion rather narrows the doctrine in Twyne’s Case, as *it required the execution of the power to sell* to constitute the possession fraudulent.”³

To ascertain the doctrine properly to be drawn from Twyne’s Case, a careful scrutiny will, in the next chapter, be made of that case and those succeeding English cases which presented similar states of facts.

¹ 21 Jac. 1.

² Mace *v.* Cadell, 1 Cowp. 232 (1774).

³ Sands *v.* Codwise, 4 Johns. 536 (at p. 564); 4 Am. Dec. 305.

CHAPTER II.

THE DOCTRINE OF THE ENGLISH CASES.

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31. Late English cases; the question not involved.
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§ 6. Retained power of disposition the important element in Twyne's Case. — The rule of Twyne's Case which

is applied in *Robinson v. Elliott*, is illustrated in the second resolution of the Star Chamber, viz.: "The donor continued in possession, *and used them as his own*; and by reason thereof he traded and trafficked with others, and defrauded and deceived them;" and in the fifth resolution, which is allied to, if not drawn from and depending on, the second, viz.: "Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud." If one be indebted to several, and makes a gift of all his goods to one creditor in satisfaction of his debt, says the learned reporter, "but there is a trust between them that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, *and is contented that he shall pay him his debt when he is able*, this shall not be called *bona fide*." This language, though applied to a supposed case of a sale or a gift — perhaps secret, as in *Twyne's Case* — yet describes very aptly the result of all cases under mortgages, such as *Robinson v. Elliott*, or *Brett v. Carter*. Publicity, notice, registration, actual consideration, all fade into immateriality in view of an agreement under a mortgage that the mortgager shall continue to use the goods as "his own proper goods," and practically shall pay his secured creditor when he is able, or is ready, to do so; for that is all that is in reality left of the arrangement miscalled a mortgage. Some of the later English cases have not announced this vicious principle, in the most apt terms, as the reason for their decisions. But, in the cases below referred to, the fact notably existed of a reservation of this kind by the debtor for his benefit. It has been often said that courts may, and frequently do, give most correct judgments without illustrating them by the logical reasoning which might have been presented as their inherent

strength and support. Doubtless, in England as in America, jurists have felt the full force of the facts of the case, and the necessarily fraudulent tendency of a reservation of a power of sale and disposition under such conveyance, without expressing their feelings and convictions in apt terms. Especially may we accept this as the fact when we find them referring, without further explanation, to Twyne's Case as authority, and find the proper authority in the second and fifth items of the judgment of the Star Chamber, and the facts to which that judgment applied.

§ 7. Ryall v. Rowles; the same element present. — The earliest reported case, after Twyne's Case, is Ryall *v.* Rowles,¹ arising in 1749. (It is reported, also, as Ryall *v.* Rolle.²) This was a case of a mortgage of utensils and stock of goods in trade of a brewer, the mortgager having not only retained possession, but continued, as usual, with his business. The goods conveyed were "utensils, hops, malt, fixtures to the freehold, and stock in trade," as stated by one of the judges.³

The case was considered under the statute 21 Jac. I., c. 19, relating to insolvencies. But it was argued on general principles, applicable to every case,⁴ and the principle under discussion, which had its origin prior to that statute, was found to be involved, and was adjudicated. Burnet, J., said: "The leading case on this is Twyne's Case, where it is held that it was upon a valuable consideration, but not *bona fide*, from the continuing in possession *and trading therewith*. It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to

¹ 1 Ves. sr. 348.

² 1 Atk. 165, and 1 Wilson, 260.

³ 1 Atk. 175.

⁴ See May on Fraud. Conv. 117.

procure a collusive credit; and it is the same, whether in absolute or conditional sales.”¹ Lord Hardwicke, during the argument of counsel, replied to their suggestions as follows: “The chattels are stock and utensils in trade, the debts due and to be due; and yet, possession of the whole left with the bankrupt, who had the order and disposition of them as before, *sold, altered and disposed as owner*, was reputed as such, and all this with the express consent of the mortgagee, who might have prevented this. Nor was he to account with the despoilee for what he should sell, nor for any of the debts he should recover; that might probably have altered the case.”² All the four judges agreed in exposing, in their opinions, the fraudulent and delusive character of such misnamed mortgages; and it was stated that the statute of 13 Eliz., on which in part the decision was rested, was “only declaratory of the common law.”³ The case of Stephens *v.* Sole, in which fraud was adjudicated by Lord Chancellor Talbot, in 1736, was referred to approvingly by all the judges. The substance of that case was thus cited by Lord Hardwicke, in Bourne *v.* Dodson.⁴ “There a person, owner of three hoyts belonging to the river Thames, mortgaged them, and after he had so done, was suffered by the mortgagee to make use of them in the same manner as before for three years together, and *appeared to all intents the visible owner*, and persons lent him money upon the credit of his being the owner, and therefore a very strong case.”

Ryall *v.* Rolle was reported by Wilson in a brief and concise form, in language which shows clearly what was then understood to be the doctrine of the case. The entire report of the decision is as follows:⁵

“Ryall *v.* Rolle. In chancery, before Lord Hardwicke, assisted by Lee, Chief Justice B. R., Parker, Chief Baron

¹ 1 Ves. sr. 360.

² 1 Ves. sr. 353.

³ 1 Atk. 178.

⁴ 1 Atk. 157.

⁵ 1 Wilson, 260.

of the Exchequer, and Burnett, one of the judges of the C. B.; who delivered their opinions *seriatim* upon the 27th of January,¹ and unanimously gave judgment that if a man mortgages his goods and chattels and debts for a valuable consideration, and the mortgagee permits the mortgager to keep possession, and to have the ordering, selling, and disposing thereof, this gives the mortgager a false credit, is fraudulent against creditors, and the mortgager afterwards becoming bankrupt, the assignees under the commission are entitled to have these goods.”

§ 8. Lord Mansfield's opinion in Worseley v. De Mattos. — Worseley *v.* De Mattos² was determined in 1758. One Slader had mortgaged all his goods, materials, and stock in trade as a brewer, as security for debt, and had authorized the mortgagee to enter and take possession upon default of payment. A feigned issue was sent out of chancery to determine whether Slader, by this mortgage, had committed an act of bankruptcy. It was held that he had, not by virtue of any provision of the statutes of bankruptcy, but because the transaction was fraudulent as to creditors, under 13 Eliz., though made by way of security and for a valuable consideration. Lord Mansfield cited the second resolution in Twyne's Case, emphasizing the words referring to the power of disposition of the goods, and said: “By the express tenor of the deed, Slader was to have the *absolute order and disposition* as before. In fact, he was permitted to continue in possession and *act as owner*. They who dealt with him trusted to his visible trade and stock. They trusted to the bankrupt law, that he could neither have sold nor mortgaged; and in case of a misfortune, that his effects must be equally distributed. They were imposed upon by false appearances.”

¹ 1749.

² Burr. 467.

§ 9. Edwards v. Harben; Power of disposition the fatal feature.— Next in order of time came the celebrated case of *Edwards v. Harben*,¹ involving a bill of sale of household furniture, medicines, and a stock in trade, of which possession was not to be delivered until after fourteen days from the date of the bill, which was in effect a mortgage, being given to secure a debt. Possession was not, in fact, taken under it until after the death of the grantor. Buller, J., said, in deciding the case: “We are all of opinion that if there is nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent.” The power over and disposition in trade of the stock of goods were urged upon the court, by the counsel attacking the conveyance, as material to show the fraud. He argued, first, that continued possession of chattels sold was *prima facie* evidence only of an intent to defraud; and secondly, that “whenever there is a positive agreement between the parties that the vendor shall be permitted after the sale, to have for any space of time, not only the mere manual occupation, *but also the disposition* of the goods sold, to trade with them as his own, *it is an actual fraud* on the creditors of the vendor.” He stated in the following words the collusive proposition from the creditor to the debtor, which is, in fact, embodied in such a transaction, whether spoken or not. “If you will put me in a situation to be safe against your other creditors, I will leave you in that which shall induce them not to attack you. You shall preserve the creditors from having possession; I will retain the security from the real ownership. Give me the command of the property, you shall have it to hold out to the world and your creditors as your own.”²

Though these features of the case are not specifically mentioned by the court, yet it is difficult to avoid the con-

¹ 2 Term R. 587 (1788).

² pp. 589, 590.

clusion that they influenced and controlled its decision. But this case has been extensively followed as the leading precedent for the rule that retention of possession by the mortgager will alone suffice to render a mortgage of chattels fraudulent. It is with reference to this case that Mr. Cowen criticised this supposed rule as above mentioned.¹ Indeed, it is not strange, in view of the inexact language of Mr. Justice Buller, just quoted, that such a view should be taken of the case in America, particularly as the same error is observed in many of the English cases. Yet there are not wanting English cases, as will be seen below, which support the view of *Edwards v. Harben*, here presented, and recognize it as an authority to precisely this extent.

Bamford v. Baron is referred to by Buller, J., in connection with *Edwards v. Harben*, and is reported in connection with it.² It was a case where the debtor, after conveying a stock of goods in trade to trustees, had retained possession and made sales, but he alleged that he had undertaken to account to the trustees for all the profits of the trade. This was held not sufficient to validate the transaction, and applying the same doctrine announced in *Edwards v. Harben*, the court by Buller, J., granted a new trial, setting aside the verdict which sustained the transaction.

§ 10. Lord Kenyon's opinion in *Paget v. Perchard*. — In *Paget v. Perchard*,³ one Mrs. Spencer, an inn-keeper, had given to her distillers a bill of sale of all her effects, including the liquors in the house, as well as furniture. The grantees were in possession, yet they had permitted Mrs. S. to sell liquors in the usual way of trade, for one day, and to receive the money, not accounting for it to them. Lord Kenyon said: “That the allowing Mrs. Spencer to appear, as usual, mistress of the house, and to execute acts

¹ See sect. 5.

² 2 Term R. 594.

³ 1 Esp. 205 (1794).

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of ownership, after having parted with all her property by the bill of sale, was inconsistent with such situation, and a sufficient evidence of fraud as against *bona fide* executions ;" and he therefore directed a non-suit, thus evidencing his view of the judicial duty to declare a fraud.

§ 11. Wordall v. Smith ; the same element present. — Wordall *v.* Smith,¹ tried before Lord Ellenborough in 1808, is a case much like the preceding. After a bill of sale of the household furniture and the stock in trade of a publican, the grantee took a colorable possession by putting his servant into the house ; but the grantor continued the business as before and had control of the sales of liquor. Lord Ellenborough's charge to the jury based the fraudulent character of the transaction upon the colorable possession ; still, it is evident that, as in Twyne's Case, the control of the property by the grantor, rather than the mere possession, was felt by the court as the vital feature of the case.

§ 12. Sir James Mansfield's views in Reed v. Blades. — Reed *v.* Blades,² in the Common Pleas in 1813, is an instructive case. Though it is reported with the head-note that "a conveyance of chattels unaccompanied with possession is void," it is not an authority for so broad a proposition. The case presented a conveyance to trustees, in trust for certain purposes, including the payment of debts, of the goods, chattels and other movable property in an opera house, together with the rents, issues, profits, subscriptions, door money, and other income of the building and the business. The trustees never took possession of the opera house, nor the chattels named, nor assumed the conduct of the business, nor did Sandell, the present claimant, who claimed under a subsequent purchase. During the period

¹ 1 Camp. 832.

² 5 Taunt. 212.

from 1808 to 1811, the report states, Taylor, the grantor, "continued to act as the ostensible owner of the property; he made all contracts in his own name, received all the proceeds, paid them to his own account at the bankers, and drew for money from thence in his own name." Mansfield, C. J., who presided at the trial, directed the jury, that Sandell, the claimant of the goods, never having acted nor had any concern in the management or possession of the opera house, the supposed sale to him in 1799 was wholly inoperative, and that the goods were liable to seizure as the property of Taylor; and this direction controlled the verdict. On a motion for a new trial before the full bench, the judges all agreed in refusing it, on the ground that Taylor had continued in not only the possession, but the visible actual ownership, control and disposition of the property and the business. Mansfield, C. J., said: "The case, when examined, depends on very simple points. The first question is, whether Taylor and Goold had, *quoad* their creditors, the legal possession of the goods in this opera house. *Taylor is the only person who has the management, orders the dresses, purchases the goods, is, to all the world, the visible owner and possessor.* In 1792, a secret trust deed is executed to trustees for certain creditors, etc. *What do the trustees do? Nothing. What do those creditors get? Nothing.* Taylor continues the acting and visible owner and possessor; it is nevertheless contended, this legal property all passed to these trustees. Now, where the subject of the deed is goods, and the possession never taken by the trustees, and nothing done under it, how can it be said these goods may not be taken in execution under a judgment against Taylor? I do not wonder that the trustees should be unwilling to act in such a troubled business, but then they should not undertake such trusts; they might appoint agents to make all contracts and conduct all management, or they may let Taylor make contracts with their

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express assent; but they do nothing of all this; as to all the world, then, the trust deed is void, and I cannot at all feel that it stands in the way of the right of creditors to take these goods as the goods of Taylor. Though I wished to avoid this question, and send it where all the conflicting interests might be better taken care of, I am obliged to decide it by saying, that they who sell goods to Taylor may, so far as these trustees are concerned, take the goods in execution as the goods of Taylor.” And he disposed in like manner of the claim that Sandell had acquired, under the circumstances, a valid title to the goods.

§ 13. Armstrong v. Baldock; the same element present. — *Armstrong v. Baldock*¹ is a case where the instructions to the jury were placed on the ground alone that possession remaining with the grantor is fraudulent in law; the case being one of a conveyance which included a stock in trade together with household furniture. The action was trover for the furniture only, not for the stock in trade. The case has, however, been recognized by the English bar as really resting on the same basis as the cases above referred to. The language of Dallas, C. J., plainly refers to the point that the grantor had reserved and exercised a power of sale. “Here Nicholas brought the furniture from his former residence, and he alone, from the time of the assignment until the seizure, exercised acts of ownership over it. Indeed, it could not be predicted from appearances that any other person than himself was the proprietor of the property.”

§ 14. Cases supposed to be antagonistic; Benton v. Thornhill. — There are a few cases to be found in the English reports which have been sometimes taken as authorities against the proposition supported by the preceding cases.

¹ 1 Niel Gow, 33 (1818).

One of these is *Benton v. Thornhill*.¹ But in this case, there was conflicting evidence on the point in question, which was left to the jury ; they were told that an intent to reserve any benefit to the grantor would avoid the conveyance ; there was not a complete and undisputed possession by the debtor, the agent of the creditor having been in at least partial possession ; and the verdict in favor of the creditor was taken by the court (Gibbs, C. J.), as sustaining the possession of the mortgagee, and negativing the idea that he had assented to any acts of ownership on the part of the debtor, or that there was any reservation for his benefit. The case is, therefore, in harmony with rather than in opposition to the doctrine in question.

§ 15. Bucknall v. Roiston of doubtful authority.—*Bucknall v. Roiston*² was a case of a cargo of goods, taken out on shipboard for the purpose of foreign trade, which was pledged to a creditor, not only by a bill of sale of the goods, and of “the produce and advantage that should be made thereof,” but also by a bottomry bond for three years ; and the chancery court, on the theory of a trust for the faithful accounting of the goods and profits thereof, held the conveyance good as against a creditor by a prior judgment ; and gave the bond-creditor an account of the goods that were brought home, though the goods had repeatedly changed form, the original stock having all disappeared. In the light of more modern decisions, a contrary conclusion might well have been reached. This case is referred to by Buller, J., in *Edwards v. Harben*, as having been decided alone on the ground of the trust ; and it may be read between the lines of the latter decision, that *Bucknall v. Roiston* is not to be regarded as an adverse authority. The same may be observed in the opinions of the judges in *Ryall v. Rowles*, Burnet, J., saying of the Lord

¹ 7 Taunton, 149 (1816).

² *Proc. in Chancery*, 285 (1709).

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Chancellor's opinion in *Bucknall v. Roiston*: "His words are, 'That here was no possession calculated to acquire a false credit,' which is a plain declaration that a possession so calculated as to acquire a false credit, would have made the transaction void."¹

§ 16. Reserved power of sale an element in eight cases. — It will be observed, then, that there are eight English cases, all decided prior to the introduction of the doctrine in question into this country, and in which the element existed of a power of sale or disposition reserved to the debtor; and that this element was, in each case, acknowledged as influential, to a greater or less extent, in determining the decision of the court. Whether so acknowledged at the time or not, it is plain in the light of subsequent comment on these cases, to be hereafter referred to, that this element in them was the controlling one. According to well settled principles, it is necessary, in considering questions of law as illustrated by authority, to look particularly to the facts of the case decided. In no other manner can proper distinctions be drawn, or proper limitations upon legal rules be established. Now, that jurists are generally agreed that retention of possession by a mortgager does not alone render a mortgage of chattels fraudulent, it is idle to cite as an authority for such a proposition, or even as a case which was formerly taken as an authority for it, any of these English cases which did not rest upon retention of possession alone, but which was distinguished by the element of a reserved power of sale added to the possession. This element is plainly found in *Twyne's Case* and the succeeding cases above cited. The conclusion seems inevitable that these cases are direct authorities in support of the doctrine of *Robinson v. Elliott*, as a common-law doctrine, and that its visible origin is to be found in *Twyne's Case*,

¹ 1 Atk. 168.

§ 17. Mere retention of possession unimportant. — It is not strange, however, that American courts and lawyers were at first inclined to treat Twyne's Case, Edwards *v.* Harben, and kindred cases, as authorities on the question of retention of possession alone. Neither Twyne's Case, nor Edwards *v.* Harben, rested merely on possession; yet the language of Buller, J., in the latter case, plainly leads to a supposition that this was really the point decided. So, also, it frequently occurred, that in considering cases where retention of possession alone was the feature under discussion, Twyne's Case, and notably Edwards *v.* Harben, were referred to as holding that such retention of possession alone would suffice to make a mortgage fraudulent. Taking the expressions of Mr. Justice Buller, in the last named case, as exact statements of the legal rule, it was quite natural, when the facts of any new case indicated the necessity of distinguishing it from Edwards *v.* Harben, to resort to the expedient of establishing exceptions to the general rule, of which exceptions, as before stated, Mr. Cowen enumerated twenty-four. The controversy thus arose, and was thus waged, about Edwards *v.* Harben, in misapprehension of what now seems to be the true doctrine of that case.

There appears, nevertheless, to be a continuous line of English decisions, running *pari passu* with those above cited, in which the element of possession alone under a chattel mortgage was involved and was distinctively considered.

In a number of these cases, to which reference will now be made, it was distinctly held, as a common-law rule, that retention of possession alone did not render such a conveyance fraudulent; and this without either overruling or ignoring Twyne's Case. Doubtless, if in every case the distinction had been carefully drawn between retention of possession alone, and retention of possession with power of sale and disposition, and if the court had explained in every

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case, that in one of these classes of cases the conveyance would be held conclusively fraudulent, while in the other it would not be so held, neither misunderstanding nor controversy upon this question would ever have arisen. But courts are not usually so astute as this in endeavoring to prevent misapprehensions concerning their decisions. It is well understood that the influence of every decision is to be limited by the facts of the case decided. Students of the law should always observe this rule in studying cases as authorities ; and when mistakes or misapprehensions prevail, as frequently happens, it may become necessary to correct them by a careful review of the authorities in the light of this rule. Turning, then, once more to the English cases, we shall find very considerable authority for the rule that retention of possession alone did not at common law render a mortgage of chattels or other conveyance thereof as security fraudulent or void.

§ 18. Retention of possession alone not conclusive of fraud ; Stone v. Grubham. — The earliest case to be referred to is *Stone v. Grubham*,¹ which arose soon after Twyne's Case. Though hardly an authority, inasmuch as the conveyance was of a lease for years; yet the case indicates the early view of the law. The grantor had made a gift to the grantee of all his goods and chattels, including the lease, by way of security, but continued in possession of the land, the lease being surrendered to the grantee. Sir Edward Coke and his associates held that the retention of possession by the grantor would not be considered fraudulent except upon proof that it was done to defraud and deceive creditors. The language of the court implies that the lease was treated as a chattel interest, and the case, therefore, has been sometimes regarded as an authority in cases involving chattels.

¹ 2 Bulst. 225 (1615).

§ 19. **Lord Holt's dictum in Meggot v. Mills.** — Meggot *v.* Mills,¹ which arose in 1697, was a case where the conveyance, being a bill of sale given as security, covered only the household furniture of an inn. The grantor retained possession, but there was no power of sale reserved. The case thus presents the question of retention of possession alone. Lord Holt, C. J., sustained the conveyance as a security, though apparently with some doubts. In this case the secured creditor became such only at the time of and in connection with the conveyance, he having supplied the money with which the debtor purchased the furniture. It was upon these facts particularly that Lord Holt sustained the conveyance, saying: “If these goods of Wilson's had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors.”

This indicates plainly the opinion of Lord Holt that such was the general rule of law, to which he was establishing an exception.

Twelve years later, in the argument of Bucknall *v.* Roiston, in chancery,² Sir Edward Northey as counsel said: “It has been ruled forty times, in my experience, at Guildhall, that if a man sells goods and still continues in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held.” The singular feature of this matter is, that no case which supports the *dictum* of Lord Holt or the argument of Sir Edward Northey has ever been found in the reports.

If this doctrine was ever seriously entertained, it was evidently for but a brief period. Mr. Justice Burnet said, among other things, in Ryall *v.* Rowles,³ in 1749: “Possession is no otherwise a badge of fraud, unless as calculated to deceive creditors.”

¹ 1 Lord Raym. 286.

² Prec. in Chancery, 285 (1709).

³ 1 Ves, sr., at p. 360.

§ 20. **Views of Lord Mansfield in Cadogan v. Kennett.**—In *Cadogan v. Kennett*,¹ decided in 1776, but not involving the precise question, Lord Mansfield expressed his views on the general subject as follows: “There are many things which are considered as circumstances of fraud. The statute says not a word about *possession*. But the law says, if after a sale of goods, the vendee continue in possession, and appear as the *visible* owner, it is evidence of fraud; but it is not so in the case of a lease, for that does not pass by delivery. * * * The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. If there be a conveyance to a trustee *for the benefit of the debtor*, it is fraudulent.”

§ 21. **Lord Eldon's Views; Buller's synopsis of Twyne's Case.**—*Kidd v. Rawlinson*² was a controversy over certain household furniture, under the following circumstances. The plaintiff advanced money to one Aburn with which to purchase the furniture, and took from him a bill of sale therefor as security, but left Aburn in possession. The defendant, a creditor of Aburn, procured from him a second bill of sale, and took possession of the goods, though with notice of plaintiff's prior title; and the defendant having sold the goods, plaintiff sued him for their value and recovered judgment. Lord Eldon, in sustaining the verdict, said: “It appears to me that this does not fall within the principle of Twyne's Case and the other cases on the subject.” He also cited, with his sanction, the following passage from Buller's *Nisi Prius*, which is that author's brief synopsis of the entire doctrine of Twyne's Case:—

“A., being indebted to B. in £400, and to C. in £200, C. brings debt, and hanging the writ, A. makes a secret

¹ 2 Cowper, 482.

² 2 Bos. & Pul. 59 (1800).

conveyance of all his goods and chattels to B. in satisfaction of his debt, but continues in possession, and sells some, and sets his mark on other sheep; and it was holden to be fraudulent within this act: (1) because the gift is general; (2) the donor continued in possession and used them as his own; (3) it was made pending the writ, and it is not within the proviso, for though it is made on a good consideration, yet it is not *bona fide*.

“But yet the donor continuing in possession, is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money.”¹

§ 22. Lord Eldon’s further views of Twyne’s Case.—In Lady Arundel *v.* Phipps,² Lord Eldon gave further expression to his views, as follows: “Upon this case, I believe, my decision in the Court of Common Pleas was disputed.³ My opinion upon the trial of that cause was, that possession is only *prima facie* evidence of fraud; and as that property could not be reached by bankruptcy, and the possession was according to the deed, which created the title, and the title was publicly created, that was not a fraudulent possession against the creditors in general; and, upon a motion for a new trial, the court agreed with me. With great deference, if Lord Ellenborough thinks otherwise, I am at present of the same opinion. * * * The mere circumstance of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title, not fraudulent, is shown, under which that possession has followed. Every case, from Twyne’s Case downward, supports that, and there

¹ Buller’s *Nisi Prius*, 4th ed., 1785.

² 10 *Ves.* 139 (1804).

³ Kidd *v.* Rawlinson, *supra*.

was no occasion otherwise for the statute of 21 Jac. 1, c. 19, s. 11."

In this language, Lord Eldon has been by English commentators understood (and with evident correctness) to refer to his opinion in *Kidd v. Rawlinson*. This is further apparent from what this distinguished jurist said, a year later, in *Ex parte Williams*,¹ manifestly in continuation of the same line of thought, and with the view of aiding in the removal of the prevalent misunderstandings and clearing up the existing doubts on the subject. "Having had occasion lately to look into that doctrine from *Twyne's Case*, I think in modern times a tendency has prevailed *to give more effect to the actual manual possession*, as evidence of fraud, *than Twyne's Case was intended to sanction*."

§ 23. Lord Ellenborough's views. — In *Dewey v. Bayntun*,² the same conveyance was under consideration which was involved in *Arundel v. Phipps*. A verdict for plaintiff had been found on these circumstances: "(1) The previous embarrassment of the husband; (2) the want of notoriety of the conveyance at the time; (3) the want of an inventory; (4) the continuance of the husband's possession, though consistent with the deed, yet without notice of the change of property; and (5) the appropriation by the husband of a part of the money raised by the trustees to his own use, without objection." In setting aside this verdict and granting a new trial, Lord Ellenborough said: "Indeed, if the several facts upon which this alleged inadequacy is founded had been given in evidence to the jury, viz., the annual value of the estates, the age of Lord Arundel, the value of Lord Arundel's life interest therein, and the value of the goods, it would have raised a most important question, whether an assignment, by the terms of which the creditors of the party assigning such property

¹ 11 Ves. 3 (1805).

² 6 East, 257 (1805).

were to be so materially prejudiced, was not a covinous act between the parties thereto, and on that account void as against creditors, both at common law and within the statute 13 Eliz.”

In *Hoffman v. Pitt*,¹ the question was whether it was fraudulent for the purchaser of household furniture at a sheriff’s execution sale, who had left the same in the debtor’s house subject to his use, to pay off a second execution, and then take a second bill of sale from the debtor, still leaving the goods in the house ; and Lord Ellenborough said : “ The not taking possession was in some measure indicative of fraud, but was not conclusive.”

§ 24. Views of Chief Justice Mansfield in *Steel v. Brown*. — In 1808, in the Common Pleas, the precise question came before Sir James Mansfield, chief justice, in *Steel v. Brown*.² This case involved a bill of sale of “ fixtures and goods ” in a public house, the grantor retaining possession, but not reserving a power of sale or disposition. The chief justice, in sustaining the conveyance, said : “ No case has decided that a bill of sale unaccompanied by the possession may not under certain circumstances be fair and valid.”

§ 25. Judicial doubts ; *Jezeph v. Ingram*, and *Woodeman v. Baldock*. — *Jezeph v. Ingram*³ was a conveyance of farm stock, utensils, produce, etc. The grantor remained in possession and continued to conduct the business of the farm, but for the benefit of the grantee. The conveyance being attacked, was sustained by the court, but with the expression of some doubts as to whether they were not “ ripping up old cases ” and “ removing the landmarks.”

¹ 5 Esp. 22 (1803).

² 1 Taunt. 381.

³ 8 Taunt. 838 ; 1 Moore, 189 (1817).

In *Wooderman v. Baldock*¹ the sole evidence of fraud, outside of the fact of the use of the goods by the grantor, was that the trustees had advertised the goods for sale as the goods of the grantor; but as the judges were of opinion that there was nothing in these circumstances inconsistent with the trust deed, the verdict of a jury in favor of the transaction was sustained.

§ 26. Judicial doubts; *Steward v. Lombe*. — *Steward v. Lombe*² was a case of a mortgage on land on which was a windmill, specifically conveyed in the mortgage. The windmill having remained in the mortgager's possession, was levied on at the instance of his execution creditor. The mortgager having the right to remove the mill from the land at pleasure, it was held that the mill was under these circumstances a chattel. But the possession of the mortgager was held not to invalidate the mortgage as to the mill; actual change of possession was held unnecessary under the circumstances of the case, even had it been more feasible; the court did not consider an actual change of possession requisite in all cases of conveyance of chattels as security, and expressed doubts whether such was to be considered the proper doctrine to be drawn from *Edwards v. Harben*, which was pressed upon the court as an authority for that view.

§ 27. Lord Tenterden's views. — *Latimer v. Batson*³ was a conveyance of household furniture, farming stock, and other property, including wine, made by a sheriff on execution sale. The purchaser from the sheriff put his own man-servant in nominal possession of the property, but left it virtually in the hands of the Duke of Marlborough, the execution debtor, who was allowed to use the goods at

¹ 8 *Taunt.* 676 (1819).

² 1 *Brod. & Bing.* 506 (1820).

³ 4 *B. & C.* 652 (1825).

pleasure. The transaction was sustained by the court; the case being distinguished from *Wordall v. Smith*,¹ which was distinctly approved. Abbott, C. J., said: "I perfectly agree that possession is to be much regarded; but that is with a view to ascertain the good or bad faith of the transaction." No reference was made by the court to the wine which was included in the purchase; a conspicuous silence, which the impartial student of the law is inclined to ascribe to the influence of the great name of Marlborough.

But the views of this eminent judge on the question of possession alone were again unequivocally expressed, during the same year, in *Eastwood v. Brown*.² In this case, a debtor had sold and transferred to one of his creditors his household furniture, retaining the occupation and possession of his house and the furniture as before; and Abbott, Lord C. J., held that this did not furnish conclusive evidence of fraud, and left it to the jury to determine the question of fraudulent intent.

§ 28. The question of the effect of possession alone settled in *Martindale v. Booth*; *Edwards v. Harben* distinguished. — In *Martindale v. Booth*,³ there are evidences that the judicial mind in England had at last settled down upon the proposition that retention of possession alone was not sufficient to invalidate a mortgage or conveyance of chattels. The case was a bill of sale of furniture and fixtures in a tavern, as security, with a reservation of the possession and use, which, of course, under the circumstances, did not imply a power of sale or disposition, or any other reservation by the grantor inconsistent with the conveyance as a security. Lord Tenterden and his associate judges agreed that the conveyance was valid. Lord

¹ 1 Camp. 332; sect. 11, *supra*.

² 1 Ryan & M. 312 (1825).

³ 3 B. & Ad. 498 (1832).

Tenterden's opinion was substantially the same as that given by him in *Latimer v. Batson* and *Eastwood v. Brown*; all the other judges discussed the preceding authorities with the evident view of drawing such distinctions as to deduce from them a harmonious general rule. Attention was particularly directed to the circumstance that the case of *Edwards v. Harben* had been frequently misunderstood. Reference was made to the denial of Dallas, J., in *Jezeph v. Ingram*, that *Edwards v. Harben* lays down any general rule that want of possession alone will render a mortgage of chattels fraudulent. Parke, J., for himself, referred to the statement of Buller, J., in the last named case, that, "if there is nothing but the absolute conveyance without possession, that, in point of law, is fraudulent," as a mere *dictum*. This plainly implies that the question of possession alone was not the one involved in *Edwards v. Harben*, and that the real point in that case was whether possession, with a power of disposition reserved, would be considered fraudulent. It thus appears that *Edwards v. Harben* is understood in England as an authority for the doctrine of *Robinson v. Elliott*, namely, that the retention of possession under such conveyances, when combined with an unrestricted power of sale or disposition, is wholly inconsistent with the conveyance as a security, and is fraudulent and invalid. But, on the other hand, *Edwards v. Harben* should never have been taken as an authority for the proposition that retention of possession alone will necessarily invalidate such a conveyance.

Accordingly, in *Hunter v. Corbett*,¹ which was a controversy over a bill of sale of furniture in an inn, given as a mortgage, the vendor remaining in possession, but without any power of sale or disposition, the case was treated as turning on fraudulent intent; and it was said, as to the

¹ 7 Up. Can. Q. B. 75 (1849).

retention of possession, “that has long been held not to be an absolutely conclusive proof of fraud, but only to furnish evidence of it.”

§ 29. Edwards v. Harben further explained in Macdona v. Swiney.—That the view here taken of the case of Edwards *v.* Harben is the correct one, and that it is a mistake to refer to that case as an authority for the doctrine that retention of possession alone renders a conveyance of chattels fraudulent in law, may be further seen by reference to the case of Macdona *v.* Swiney.¹ In that case the plaintiff, having purchased at an execution sale certain goods levied on as the property of his debtor, left the goods for some months in the possession of the latter, when they were again levied on at the instance of a creditor by a judgment junior to the first execution, the date of the indebtedness to the junior creditor not appearing. The Court of Queen’s Bench declined to declare the transaction fraudulent in law, on the authority of Edwards *v.* Harben. That case, as well as Twyne’s Case, was distinguished from the one at bar by the circumstance before mentioned, that the debtor remained not only in the possession, but the control and disposition also of the goods. The arguments of counsel who attacked the conveyance in Edwards *v.* Harben were especially referred to, as indicating the drift of that case; and the absence of any *jus disponendi* in the case at bar was pointed out. The statement of Buller, J., that his brethren and himself were agreed in that case, that “unless possession accompanies and follows the deed, it is void,” was construed to refer to nothing other than possession under the circumstances of that case, where possession implied disposal also. The like inference was drawn from the decision of the Court of King’s Bench in Jarman *v.* Woollo-

¹ 8 Irish Law Rep. 73 (1858).

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ton¹ and Haselinton *v.* Gill,² each of which cases involved and sustained an ante-nuptial settlement of a wife's stock in trade, etc., which was attacked in each case by creditors of the husband, on the ground of the possession of the latter; Buller, J., who sat in both cases, saying in one, that "possession alone is not evidence of fraud; the transaction must be shown to be fraudulent from other circumstances; if the possession be inconsistent with the conveyance, that is evidence of fraud;" and in the other, "it is sufficient to say that the husband had not *the order and disposition* of this property *with the consent of the real owner*; the trustee was the legal owner."

§ 30. Late English cases; the question of power of sale not considered. — No contrary view is disclosed in the late English cases. The precise question has not since been considered by the courts in any reported case, though occasionally such facts have been presented as would have warranted a discussion of it. Gale *v.* Burnell³ was a case of a conveyance of furniture and farming stock, given as security for debt, which was attacked by an execution creditor of the grantor. The deed was held valid and operative as to the property on hand when it was executed, but not as to after acquired property. The principal question considered was, whether the deed operated as a present conveyance of the property. The stipulation in it that the grantor might "make use of" the property, was held equivalent to a license to consume such articles as were perishable, if any; but this license was passed by as not defeating the original grant, or implying any power of disposition for the benefit of the grantor; so the question of a reservation to his use, or of any other fraudulent aspect of the transaction, was

¹ 3 Term R. 618 (1790).

² *Id.* 620.

³ 7 Q. B. 850 (1845).

not mooted. *Graham v. Chapman*¹ was a conveyance by a trader of all his tangible property, including his stock in trade, to secure one creditor; and it being a sweeping conveyance, the execution of it was held an act of bankruptcy, which was the question at issue. The minor question of a reserved power of sale, which might possibly have arisen in view of the trader's retained possession and control under the circumstances of the case, for several months, received no attention. Upon the more general question it was said: "Every person must be taken to intend that which is the necessary consequence of his own act; and if a trader make a deed which necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent." And so in *Spencer v. Slater*,² where an insolvent trader made a general assignment for creditors, to trustees who were to carry on the business, but no creditors were to receive dividends who did not affirmatively assent to the conveyance, this was held to hinder and delay creditors, and therefore, to be fraudulent and void under the common law, without reference to the rules in bankruptcy cases. In *Ex parte Games*,³ where a farmer had assigned to one creditor, by way of mortgage, all his household furniture, "stock in trade," and crops and implements on his farm, the mortgagor to remain in possession until demand of payment, and the mortgage to cover such goods as might be "substituted in lieu" of those conveyed, it was charged that this mortgage was fraudulent as to other creditors under the statute of Elizabeth; and the chief judge in bankruptcy held it to be so, because it necessarily hindered and delayed creditors. In the chancery division of the High Court, on appeal, the contrary view was taken that the transaction was merely an ordinary and lawful prefer-

¹ 12 C. B. (74 E. C. L.) 85 (1852).

² L. R. 4 Q. B. D. 13 (1878).

³ L. R. 12 Ch. D. 314 (1879).

ence of a particular creditor; and without any consideration of the power of sale in the mortgager as a reservation for his own benefit inconsistent with the security, the point was dismissed with the remark, that this provision was but a mode by which the mortgagee secured the substitution of new chattels in the place of old ones. The High Court could not "see any fraud in that," nor did it think the conveyance was in any manner a cloak for retaining a benefit to the grantor, because there did not appear to be any fraudulent intent in the case. Fraud in the transaction was considered solely as turning on intent, and the question of the operation of the power of sale, as involving a necessarily fraudulent tendency, was not argued or considered. It should be observed that the mortgagee in this case had taken possession of the property before the controversy arose.

In the two recent cases of *Ex parte Popplewell*¹ and *Ex parte Bolland*,² the question may perhaps have been fairly involved, though the meagre report of the facts leaves this doubtful. In each case the debtor had made a conveyance of goods and chattels, including what is styled "stock in trade." In the first named case, the debtor had been carrying on the business of manufacturing mantles, and in the last case that of brewer; and in each case he retained possession until he became bankrupt. Such a conveyance by a brewer would seem by implication to reserve to him the right of selling the property; though in the case of a mantle manufacturer, this implication would not be so clear, and it might well be that no power of sale was contemplated. But the question seems not to have been raised or considered. In each case, the trustee in liquidation applied for an order declaring the conveyance void as against him, but urging as the principal ground that the consideration

¹ 21 Ch. D. 73 (1882).

² 21 Ch. D. 543 (1882).

had not been truly stated therein, and making no mention of any power of sale reserved to the grantor, if such there were. The cases are considered in much the same manner as if the contest had been between the parties themselves, or as if the trustee merely stood in the shoes of the grantor in the conveyance.

§ 31. Late English cases; the question not involved.—Three cases were heard and decided in 1880, involving conveyances similar in their nature, and which have been sometimes supposed to present a variation of this question. In *National Mercantile Bank v. Hampson*,¹ the judges of the Queen's Bench Division held that where, under a bill of sale of growing crops on farming lands, the grantor is allowed “to hold himself forth as having not only the possession, but the property in the same,” he has an implied license to sell the crops, and a sale of wheat by him to a third party passes the title, so that the grantees in such bill of sale can sustain no action against the purchasers for conversion of the wheat. A similar question arose in *Walker v. Clay*,² in the Common Pleas Division of the High Court, where the grantor in a similar bill of sale, covering, among other things, a “stock in trade,” sold a pony which was included in the conveyance, and it was held that his vendee acquired title as against the grantee in the bill of sale, and that the case was undistinguishable from *Bank v. Hampson*. These cases proceed on the familiar principle that every such conveyance, though it might have been in a proper case declared fraudulent as to creditors, is good between the parties. The only question considered in either is the proper construction of the instrument, from which it appeared that the grantee had licensed the act of the grantor of which he was com-

¹ L. R. 5 Q. B. Div. 177 (Feb. 1880).

² 42 L. T. (N. S.) 369 (Mar. 1880).

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plaining. But in *Taylor v. McKeand*,¹ a careful construction of the bill of sale led to a different conclusion. Here the grantor, retaining possession, had the privilege of selling the goods of his stock in trade "in the ordinary way of business." He having, however, sold part of the goods in a manner which the jury described as "fraudulently, and not in the ordinary course of his business" (that is, fraudulently as to the grantee in the bill), it was held that the purchaser from the grantor acquired no title as against the grantee, though he made his purchase in good faith and without knowledge of the fraud. This decision was made without conflicting with the case of *Bank v. Hampson*, from which it is plainly distinguishable. *Payne v. Fern*² is a similar case to *Taylor v. McKeand*, and is decided similarly. As none of these cases exhibited the element of a complaint by a creditor of the grantor, the question of fraud upon creditors was not involved in any of them; and they all stand in perfect harmony with *Edwards v. Harben* and *Robinson v. Elliott*, so far as concerns that question.

Somewhat similar to *Bank v. Hampson* was the later case of *Ex parte Allard*,³ in which the trustees under a composition in bankruptcy had allowed the debtor to go on with the business, and his transfer of certain book debts to a third party as security, being questioned, was sustained as being within the implied authority conferred by the trustees.

In *Ex parte Symmons*,⁴ the conveyance had reserved a power of sale to the grantor, but before his bankruptcy he had delivered the remaining goods to his creditor in satisfaction of the debt, and this was held to give him a valid

¹ L. R. 5 C. P. Div. 358 (May, 1880).

² L. R. 6 Q. B. Div. 620 (Feb. 1881).

³ 16 Ch. Div. 505 (1881).

⁴ 14 Ch. Div. 698.

title to them.¹ In *Ex parte Bayly*,² where the same element existed, the creditor had before the bankruptcy taken possession of the remaining goods, claiming them under his conveyance, and it was held that an injunction against his exercise of ownership, pending further proceedings, could not properly be granted. The principle under consideration was not, therefore, involved in either of these cases. Nor did it enter into *Crawcour v. Salter*,³ the decision in which merely sustained a conditional transfer, or letting to hire, of hotel furniture, as retaining title in the vendor.

§ 32. The doctrine of Twyne's Case superseded in England. — The desuetude into which this once vigorous doctrine of Twyne's Case has fallen in England, is doubtless to be attributed to the fact that it has been so supplemented by the English statutes as to become superseded. But for this fact, the citations made from the English cases show that this doctrine might well have remained as still an active force in the English jurisprudence. But the continued and general operation of their established bankrupt system draws into the bankruptcy courts all cases involving this question, in which insolvency has occurred and has been declared; and the bankrupt laws render void all such conveyances where the goods remain in the “order and disposition” of the bankrupt; which is, *pro tanto*, a statutory adoption of the precise principle. Since 1854, nearly all such cases, not within the rules pertaining to bankruptcy, fall under the statute of that year, or the subsequent statute of 1878, which require the registration of all bills of sale and conveyances of chattels within twenty-one days

¹ See sect. 144, *post*, for a reference to the American cases, in which a formal delivery of goods, under similar circumstances, was advisedly sustained.

² 15 Ch. Div. 223.

³ 18 Ch. Div. 30.

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after their execution ; in default of which, the conveyance is to be void as to all goods found thereafter in the “apparent possession” of the grantor. So many of the cases which arise, therefore, fall under these statutory provisions, that it is of rare occurrence that a case is presented in England, depending for its decision upon the ancient common-law doctrine. It is possible that a case may arise, where a trader not declared a bankrupt has mortgaged his goods by a registered conveyance, and he continuing in “apparent possession,” and in the disposition of the goods by sale, the question of inherent fraud would be presented, to be determined, not by an appeal to the registration acts, but by a reference to the rules of the common law, irrespective as well of these acts as of the bankrupt statutes. The English courts investigate even registered conveyances to see if they are fraudulent;¹ and they declare the fraud when ascertained.² The object of the registration acts not being to make good a conveyance fraudulent as to creditors, even “the most fraudulent deed will be well registered,” if the provisions of the act are complied with.³ But the indications are, from such cases as *Gale v. Burnell* and *Ex parte Games*, that the question would not now be considered in England as of vital importance.

¹ *Darvill v. Terry*, 6 H. & N. 812 (1861); *Mercer v. Peterson*, L. R. 2 Exch. 304 (1867).

² *Oriental Banking Co. v. Coleman*, 3 Giff. 11 (1861).

³ *Darvill v. Terry*, *supra*. See May on Fraud. Conv. 120.

CHAPTER III.

THE DOCTRINE OF THE AMERICAN MAJORITY.

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§ 33. **The doctrine of Twyne's Case vital in America.**—In America we have not, as in England, a uniform system, under which a common-law principle may be completely supplanted by statutes, so as to lose its vital force and cease to influence the course and development of jurisprudence throughout the whole land. Not only have we a complicated system, under which various independent tribunals may essay to administer much of the common law, each in its own way, so that even an established bankrupt system could not wholly deprive the doctrine under discussion of its common-law interest, but it seems doubtful whether our attempts at a bankrupt system are ever to rise above the level of experiments. These are reasons which have given the common-law questions growing out of Twyne's Case a practical interest in America, exceeding that which they have had or can acquire in the mother country.

The American phases of the doctrine will be best illustrated by a careful review of the leading cases decided in each of the States which uphold it; and the best exposition

of the doctrine will doubtless be found in the language of the judges themselves.

VIRGINIA.

§ 34. The doctrine first announced in Virginia. — In this review of the American cases, those from Virginia will be first examined, for the double reason that the doctrine was first applied in that State, and that the opinion in which it was announced has not since been excelled in the terseness and perspicuity with which the fraudulent tendencies, inherent in these transactions, are exposed. This is the case of *Lang v. Lee*, decided in 1825.¹

The deed in trust conveyed a stock of goods, stipulating that “the goods are to remain in the possession of the said Lee, and he is empowered to make sales of them, always accounting with the trustee herein named, if required to do so.” Carr, J., used the following language:²

“Now, I ask, what possible security could the deed furnish, encumbered with a stipulation like this? Is it not completely a *felo de se*? A security is taken on goods, and they are left in the possession of the debtor for ten months, with a power to sell and dispose of them as he may think proper; no check whatever; for the clause about accounting relates only to the money for which he has sold the goods. Does not this resolve the whole matter into personal security? And is the debtor more bound to account for the money than he was before for the debt?

* * * Suppose he had sold every article in the store the next day, could Lang call back the goods? Certainly not, for he had given Lee express power to sell. As a security, then, this deed was naught. What other possible purpose could it have than to delay, hinder, or defraud the creditors of Lee? The reason of *Edwards v. Harben*, *Hamilton v. Russell*, etc., applies strongly to this case.”

¹ 3 Rand. 410.

² p. 423.

Again,¹ “All the cases concur in the position, that if the power retained enable the grantor to defeat the provisions in the deed, it is null and void; and this, upon the known principles of the common law, of which the statutes on the subject of fraud are merely declaratory. Now, can we imagine a power more completely adequate to the destruction of the avowed purpose of the deed than that retained by the grantor in this case? The goods, the identical articles of merchandise, constituted the sole security provided by the deed for the payment of the debts; and yet the debtor, while affecting to devote the goods to that purpose, retains the possession, the use, the power of selling every article to whom, in what manner, and on what terms, he pleases. He is to account, though, *if* called on. But is this more than a personal accountability? The goods are gone. You can not follow them. The money received for them has no earmark. You cannot follow it though the grantor pay it away the moment after he receives it, in satisfaction of his own debt. What are you then, after all, but a general creditor? To this purpose the case of *Ryall v. Rolle*² is very strong. That, it is true, was a case under the bankrupt acts, and they are particularly strong and high-toned on these subjects, especially 21 James I. Yet the quotations I shall make do not seem so much founded on them as deduced from the principles of the common law.” He then quotes from the language of Burnet, J., and Lord Hardwicke; and says in a note to the same case: “I would not be understood to impugn the doctrine so well established, and applicable to the common case of mortgages and deeds of trust, that possession is no evidence of fraud, where it follows the deed, and is *consistent with its purposes*. My remarks, indeed, have been made to little purpose, if

¹ p. 425.

² 1 Atk. 165.

they have not shown the wide difference between such cases and that at bar."

§ 35. The doctrine adhered to in Virginia. — *Janney v. Barnes*¹ was a case where an entire stock of goods in trade was conveyed to secure all the debts of the grantors, and the latter were to remain in possession for the purpose of converting the property into money and paying the debts, but this only as agents of the grantee. The conveyance was sustained as a valid security. The failure of the appellate court to give in an opinion the reasons for their judgment detracts from the value of the case, and leaves the real basis of the decision indeterminate. But it has been treated as resting on the question of the grantor's agency for the grantee, in the later case of *Sheppards v. Turpin*,² where the opinion of Daniel, J., recognizes it as not conflicting with or detracting from the authority of *Lang v. Lee*, "an authority which stands unshaken by any decision of this court." His opinion proceeds as follows: "It (the deed under examination) conveys the whole of his estate, real and personal, including all his *choses in action*, avowedly with the purpose of securing all his creditors; yet reserves to the debtor the right to retain possession of the whole subject-matter conveyed, as against all having debts against him at the date of the deed, for three years; also the right to carry on his business of a brickmaker to any extent that he and his trustees may think proper; and empowers him to borrow from the trustees, and the trustees to advance him, any sums they in their judgment shall deem sufficient for the prosecution of his business; authorizes the trustees to become his securities in all contracts for the hire of laborers he may make; and if, at any time after such loans or advancements are made, the trustees shall deem his conduct injudicious or unthrifty, they have full power to

¹ 11 Leigh, 100 (1840).

² 3 Gratt. 357 (1847).

sell the whole of the trust property, if necessary, to pay such loans and advancements, and discharge those contracts for the laborers, to which they may have become sureties. All the creditors who do not assent to the terms of the deed on or before the 1st day of April ensuing its date, are to be postponed to those who do; and power is given to a majority in number of those who do assent, to extend the time of closing the deed to a period undefined, and unlimited except by their own discretion. No power is expressly retained to the grantor to sell his stock in trade on hand, which is embraced in the deed, but it is necessarily implied in the right reserved to carry on his business during the three years. May we not properly ask, as Judge Carr did, in the case of *Lang v. Lee*: ‘Can we imagine powers more completely adequate to the destruction of the avowed purposes of the deed than those retained by the grantor in this case?’ The debtor, whilst professing to dedicate his whole property to the payment of his debts then due, reserves to himself a power by which he may, without any violation whatever of the express stipulations of the deed, divert the whole of the property to uses and purposes wholly foreign to the leading object avowed.’

In *Spence v. Bagwell*¹ a deed was held bad which gave the grantor possession from its date, November 1, 1841, to the maturity of the debt secured, March 1, 1843, with power during that period to sell and dispose of the property conveyed, consisting of land, slaves, bacon, tobacco, and a tobacco factory with its fixtures, and to give and make title thereto, and to collect proceeds of sales; but on condition that he pay over the moneys collected to the trustee named in the deed. Though here, as in a former case, we have no written opinion of the court, yet it may be observed that while counsel defending the deed demurred to *Lang v. Lee* as an authority, that case and *Sheppards v. Turpin* were

¹ 6 Gratt. 444 (1849).

pressed upon the attention of the court by the counsel attacking the deed; so the decision may be taken as an adherence to the doctrine of those cases.

It is clear that that doctrine was already well established, from the later case of *Addington v. Etheridge*.¹ In this case, the trust deed provided that Harrison, the grantor, should keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store, until default in the payment of any of the debts secured, or until the trustee should be requested by any of the creditors to close the deed by a sale. Daniel, J., held that "this power is one incompatible with the avowed purpose of the grantor to furnish an indemnity to his creditors; is equivalent, in its effects, to a power of revocation; and fully adequate to the defeat of the provisions of the deed. And, therefore, that this deed is, according to the principles adjudicated by this court in the cases of *Lang v. Lee* and *Sheppards v. Turpin*, fraudulent *per se*, null and void."

§ 36. Distinction as to the purpose of the reserved power; agency for the trustee. — The last-named case, and the two others which it sustained, are recognized as authorities in *Marks v. Hill*,² where the conveyance to a trustee of a stock of goods in trade was sustained solely on the ground that the retention of the grantor as a salesman of the goods was but as an agent of the trustee; *Lang v. Lee*, *Sheppards v. Turpin*, and *Addington v. Etheridge*, being especially distinguished by reason of the damaging fact of the potential control reserved to the grantor over the goods conveyed. This case enunciates clearly the rule which, in fact, governed *Janney v. Barnes*.

§ 37. The reserved power of sale ascertained by implication. — Still later is the case of *Perry v. Shenandoah*

¹ 12 Gratt. 436 (1855).

² 15 Gratt. 400 (1859).

Nat. Bank,¹ in which the grantor in a trust deed conveyed, with other property, "all of his stock in trade, with all accretions to and replenishments of said stock," and continued in possession and in the conduct of his business as formerly. The court adhered to the doctrine of *Lang v. Lee* and the other cases above cited, furnishing the following reasons for its ruling. "Now it is true that in the deed under consideration, there is no *express provision* that the grantor should retain possession of the goods (the stock in trade) and carry on the business, selling and receiving the proceeds as before; but the power to do so, though not conferred in express terms, arises by clear and irresistible implication. The trustee, by the terms of the deed, can only sell 'upon the written direction of either of the parties secured; ' and it is provided that 'the trustee shall not be held responsible for any of the property conveyed until he is ordered to sell the same.' If the written direction is never given, the property is never to be sold by the trustee. The trustee has no control of it, and no accountability with respect to it. Where, then, does the possession remain? Who alone has the control over, and disposition of, these goods? Plainly, the grantor, until a sale is directed in writing by one of the parties secured. Under this deed the grantor might, for an unlimited time, go on and sell, and buy, and conduct his trade just as before, without accounting to the trustee or any one else, if the parties to the deed did not choose to give written directions to the trustee to sell. By *clear implication* from the face of the deed, this power is conferred upon the grantor. And the record shows that he acted under this implied authority *for two years*; and but for the action of the appellants in levying their execution, might have gone on for years longer. Up to the date of the levy of the execution, the grantor carried on his business just as he did before the

¹ 27 Gratt. 755 (1876).

execution of the deed, selling the goods, receiving the money, buying other goods, rendering no account, but conducting his business as if no deed had been executed. Such a power as this, whether it arises from express provisions of the deed, or from clear implication, is entirely inconsistent with the avowed purposes of the trust, and, upon the authority of the cases above cited, must be declared fraudulent *per se*, and therefore null and void."

NEW YORK.

§ 38. **Early New York cases.**—The cases in New York deserve especial attention, on account not only of their number, but also of the numerous criticisms that have been made upon them. Examples of these are seen in the quotations above made from the opinion in *Brett v. Carter*.¹ In arguing *Robinson v. Elliott*, counsel characterized the New York cases as "vacillating and unsatisfactory." But an examination of the leading cases from this State discloses far more harmony than discord.

Divver v. McLaughlin, the earliest case, arose in the Supreme Court of the state in May, 1829.² One Stephens, to secure a note for \$800, due in four months from its date, gave to McL. a mortgage on his goods and chattels in the house occupied by him, including, among others, his stock of goods in his grocery store. The mortgage provided that he was to remain in quiet and peaceable possession of the goods, and *in the full, free enjoyment of the same*. It appeared in evidence that the mortgagee had never taken possession of the property, but had allowed S. to continue to conduct business therewith until maturity of the debt, and thereafter indefinitely, on account of misfortunes of S. Three years after the mortgage was executed, Divver obtained a judgment against S., and levied on the stock

¹ *Ante*, sect. 4.

² 2 Wend. 596; 20 Am. Dec. 655.

of goods then in the store, being nominally the same stock mortgaged, but really different goods.

The court decided, among other things, that the retention of possession and the actual selling of goods by the debtor, without accounting to the creditor, rendered the mortgage fraudulent in law, and void as to the fixtures and standing casks no less than as to the goods. It was held that on a conceded or settled state of the facts, fraud is a question of law. It was said: “To sanction a transaction like this would open a door to frauds innumerable, and to an extent incalculable.”

*McLachlan v. Wright*¹ resembled the preceding case, the stipulations being similar, and the property conveyed being a brewer’s stock of beer, malt and hops, with utensils, furniture, etc. The debtor remained in charge, and sold goods without accounting to his creditor, or being required to do so. The verdict of a jury that this transaction was fraudulent was sustained, as a matter of law, on the ground that the debtor not only retained possession of the property, “*but used and disposed of it as his own.*”

§ 39. The leading case of *Wood v. Lowry*; views of *Bronson, J.*—*Wood v. Lowry*² occupies a leading position on this question. The debtor, a merchant, remained in possession, and “proceeded to sell the goods in the usual course of business of a country merchant, and in other respects used them as his own.” The jury was instructed that if the effect of this arrangement would be “to hinder, delay, and defraud creditors, they were authorized to *infer*, and ought to infer, that such was his intent.” *Bronson, J.*, pronouncing the opinion of the court, said: “*Kellogg was not the agent or servant of the plaintiffs to sell the goods and account to them for the proceeds, but was avowedly in business for himself. He had the posses-*

¹ 3 Wend. 348 (1829).

² 17 Wend. 492 (1837).

sion of the property, with full authority, by the express assent of the plaintiffs, to sell and dispose of it at his pleasure, and to deal with it in all respects as other merchants did with their merchandise. It is true that Kellogg said he would remit to the plaintiffs the avails of such property as he should sell before the 1st of June; but this was mere matter of confidence between the parties; it was no part of the contract under which plaintiffs make title. The property was not left with Kellogg to be kept until the debt was paid or the plaintiffs should call for it, but he had it for the purpose of trading with it, and making profits from the sale of it. When sold, the fruits were his own, except that, like every other debtor he was under an obligation to satisfy the demands of his own creditors. He treated the property as his own. It is impossible to say that the plaintiffs had any legal claim to it as against the creditors of Kellogg or purchasers under him." "Instead of leaving the matter to the jury, as a question of fact for their determination, the judge would have been well warranted in instructing them that the transaction was fraudulent and void in law, and that the defendants were entitled to a verdict in their favor."

The question was mooted again, though it did not fairly arise and was not decided, in *Stoddard v. Butler*.¹ This was a case of an assignment of a stock in trade by way of mortgage, the assignor being left in possession, to sell as agent only, for the benefit of the grantees. Chancellor Walworth's decision, holding this assignment fraudulent and void, was reported *sub nom. Butler v. Stoddard*.² Upon appeal, this decree was affirmed in the Court of Appeals by a divided court. Though no principle was thus settled, yet the full and exhaustive opinions of several of the senators on both sides are interesting and valuable contributions to the literature of this subject.

¹ 20 Wend. 507.

² 7 Paige, 163.

The decision of *Wood v. Lowry* corrected the aberration induced by the contrary case of *Levy v. Welsh*,¹ in which Vice-Chancellor McCoun held a mortgage of a certain stock of goods, with all the grantor might acquire, to be only *prima facie* fraudulent, and open to explanation. *Smith v. Ackér*² cannot be considered a discordant case. There it was not perishable or trading property, but a printing press, that was mortgaged. Though the mortgager was to remain in "the full and free enjoyment of it," this could scarcely intend a sale of the press. The question of fraudulent intent in such a case would properly be submitted to a jury.

§ 40. *Griswold v. Sheldon* explicit and not doubtful upon this question. — In *Griswold v. Sheldon*,³ which has sometimes been considered a doubtful case, the eight judges of the Court of Appeals were, indeed, divided as to the reasons for their decision, though concurring as to the result. But this difference of opinion, so far from sufficing to weaken the authority of *Wood v. Lowry*, did not reach the question of a reserved power of sale. So far as the judges differed in any respect upon this subject, their difference referred merely to an incidental feature of it, namely: the proper construction of the instrument before the court, and did not involve the main question in any respect. Bronson, C. J., who had delivered the opinion in the former case, drew from the language of the mortgage in this case the plain implication that the mortgager was to continue business with the goods as before; upon which he would have adjudged the transaction fraudulent, without the necessity of leaving any question of fact to the jury; and in this view he had the concurrence of three judges, one of whom (McCoun,) was the Vice Chancellor who had decided

¹ 2 Edw. Ch. 438 (1835)..

² 23 Wend. 653.

³ 4 N. Y. 581 (April, 1851).

Levy *v.* Welsh. The other four judges insisted that the language of the mortgage did not warrant such implication, and, therefore, declined to entertain it; but admitted that if such were the proper construction of the instrument, it would be void under the authority of Wood *v.* Lowry. Thus, though they were agreed as to the law on the point now under consideration, there was no adjudication upon it by the court, because they disagreed as to that primary matter; and the case was decided on other grounds. The criticism made in Brett *v.* Carter¹ is, therefore, inaccurate, that the court decided by "a bench equally divided in opinion," that the mortgage was "void on its face as mere matter of law." As the difference of opinion in this case had no reference to the rule of substantive law, Griswold *v.* Sheldon cannot be properly cited, either as an authority opposed to the doctrine of Robinson *v.* Elliott, or as weakening the support to that doctrine found in the other New York cases.

§ 41. **The doctrine established in New York.** — Edgell *v.* Hart soon followed. It was decided in the Supreme Court in June, 1851,² without reference to Griswold *v.* Sheldon. The decision of the Court of Appeals in 1853³ settled the question which was supposed to have been left doubtful in Griswold *v.* Sheldon. The license to sell in this case was inferred from a written schedule attached to the instrument. Denio, C. J., held, with the concurrence of a majority of the court, that "the existence of such a provision, *out of the mortgage or in it*, would invalidate it *as matter of law*, and that, where the facts are undisputed, the court should so declare."

In 1859 was presented the case of Gardner *v.* McEwen,⁴ in which no retreat is manifest from the position taken in

¹ 2 Low. 458.

³ 9 N. Y. 213.

² 13 Barb. 380.

⁴ 19 N. Y. 128.

Edgell *v.* Hart. Here the agreement to allow sales in course of trade did not appear on the face of the mortgage, nor was it proved. Denio, C. J., adhering to the doctrine of the last named case, held, that while the facts proved "made a pretty strong case for the jury," still it was one for themselves to determine. It is plain that here the question of doubt was as to the weight of proof and the facts proved. If the fatal fact should be finally "admitted or ascertained," the rule in Edgell *v.* Hart would apply, of fraud in law. It would seem that, upon clear proof, the court might direct a verdict of fraud in those States where such directions are allowed when the evidence is clear; substantially as was done in Paget *v.* Perchard by Lord Kenyon. This is done in New York.¹

The two later cases of Mittnacht *v.* Kelly² and Russell *v.* Winne³ present the question in both phases of the facts as to the reservation of a power of sale. In the former case the reservation appeared on the face of the mortgage; in the latter it was shown by facts *aliunde*. In both cases the mortgage was ruled to be fraudulent in law, following Edgell *v.* Hart and Wood *v.* Lowry.

In Mittnacht *v.* Kelly, Parker, J., said: "The mortgaging the whole stock in trade, *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien on the whole stock, by way of mortgage, the mortgagor making purchases from time to time, and selling off in the ordinary manner, the intent being not to create an absolute lien on any property, but a fluctuating one, which should open to release that which should be sold, and take in what should be newly purchased. This is just such an arrangement as was held in Edgell *v.* Hart to render the mortgage void.

¹ See *post*, sect. 42.

² 3 Keyes, 407 (1867).

³ 37 N. Y. 591 (1868).

The case cannot be distinguished from that, and the law, as propounded in that case, must be held applicable to this.”¹

And in *Russell v. Winne*, Grover, J., said: “The question is whether an agreement by the mortgagee made with the mortgager that the latter may sell, for his own benefit and as his own, portions of the property covered by the mortgage, renders the mortgage fraudulent and void as to such portions. It would seem that the bare statement of the proposition would be sufficient to warrant an affirmative answer.

“If there is an agreement by the mortgagee that the mortgager may sell or dispose of any of the property for his own benefit, it is established conclusively that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property. It is evident that, as to such property, the mortgagee not having any real estate therein, such real interest remains in the mortgager. Why, then, is the mortgage given upon such property? Evidently, the better to enable the mortgager to enjoy the benefit thereof, at the expense of creditors. Were there no creditors of the mortgager, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear that such an agreement shows that the mortgage was not made in good faith, and without a design to hinder creditors. *There is no question of intention to be submitted to a jury.* It already appears that, as to such property, the mortgage was not designed by the parties as an operative instrument between them; and its only operation must be to the prejudice of others. The court should, as to such property, pronounce it void, for the reason that the evidence conclusively shows it fraudulent.”

Ford v. Williams,² *Conkling v. Shelly*,³ and *Miller v.*

¹ p. 408.

² 24 N. Y. 359.

³ 28 N. Y. 360.

Lockwood¹ cannot be regarded as exceptional cases. In these cases it was a part of the agreement for sales by the mortgager that he should remit the proceeds to the mortgagee, which was held sufficient to sustain the arrangement, though not actually carried out by the mortgager. In the latter case, however, Potter, J., dissented on the ground that the case really fell within the rule of *Wood v. Lowry* and *Edgell v. Hart*, so that there was no certain security.

Nor is it clear that the late case of *Yates v. Olmsted*² is be regarded as an exceptional case. The Supreme Court³ followed the cases above referred to, and concluded that it was intended in this case to allow sales by the mortgager in due course of trade, although the referee had found that the mortgagee had made no such agreement, and did not know that such sales were made. The dissenting opinion⁴ states that the mortgagee was not in the store during the existence of the mortgage, and relies on this fact as distinguishing the case. The Court of Appeals put their decision sustaining the mortgage upon the finding of the referee, as a determination of the facts, treating it as of equal weight with the verdict of a jury; from which it resulted that no agreement for sales was made, and no fraudulent intent existed.

This is the only case, if this be one, showing any substantial deflection from the rule established in *Wood v. Lowry* and *Edgell v. Hart*, and which was succinctly stated as follows in *Russell v. Winne*: "It may, therefore, be regarded as settled that an agreement between mortgager and mortgagee, that the former may dispose of the mortgaged property to his own use, renders the mortgage fraudulent as to creditors, whether the agreement be contained in the mortgage or not" In *Frost v. Warren*,⁵ the majority of the court sustained the verdict of the jury in favor of the conveyance, in view of the slight and unsatisfactory char-

¹ 32 N. Y. 293.

⁴ 65 Barb. 462.

² 56 N. Y. 632.

⁵ 42 N. Y. 204.

³ 65 Barb. 43.

acter of the evidence, while still recognizing the principle of law above stated.

An exhaustive statement of all the New York cases has not been attempted, but sufficient citations have been made to show a clear and lively understanding, in the New York courts, of the legal fraud underlying all such so-called mortgages.

§ 42. Frequent applications of the doctrine in practice. — This doctrine has been frequently applied by the inferior courts in New York, as the well settled law of the State;¹ even to the extent of directing a verdict or ordering a non-suit, where the facts are plain and well-established,² as is done in other cases involving fraud;³ there being in such a case no question to be submitted to a jury.⁴ It may be noted also, as a different application of the same principle, that a conditional sale, reserving title, though ordinarily sustained as valid, will be deemed fraudulent and void, if the grantee is, pending the maturity of the contract, allowed to dispose of the goods at his own discretion.⁵

§ 43. The doctrine advisedly adhered to and clearly explained. — This line of cases is well supplemented by the recent decision in *Southard v. Benner*,⁶ which eliminates all that has been heretofore criticised as “ vacillating and unsatisfactory ” in the law of this State on the subject, and

¹ *Delaware v. Ensign*, 21 Barb. 85; *Marston v. Vultee*, 8 Bosw. 129; *Carpenter v. Simmons*, 1 Rob. 360; *National Bank v. O'Brien*, 6 Hun, 231; *Dutcher v. Swartwood*, 15 *Id.* 31; *City Bank v. Westbury*, 16 *Id.* 458; *Bainbridge v. Richmond*, 17 *Id.* 391; *Spies v. Boyd*, 1 E. D. Smith, 445; *Ball v. Slafter*, 26 Hun, 353; *Smith v. Cooper*, 27 *Id.* 565.

² *Dodds v. Johnson*, 3 Thomp. & C. 215.

³ *Carnes v. Platt*, 1 Sweeney, 147.

⁴ *Marston v. Vultee*, *supra*.

⁵ *Ludden v. Hazen*, 31 Barb. 650; *Bonesteel v. Flack*, 41 Barb. 485; *Powell v. Preston*, 1 Hun, 513. The same rule is adopted in Connecticut, see *post*, sect. 79; and approved in Tennessee, see *post*, sect. 61.

⁶ 72 N. Y. 424 (1878).

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which was apparently intended to close the controversy in New York. Here the evidence outside the mortgage showed that the mortgager had continued to make sales of the mortgaged property as usual theretofore, and tended to prove that this was done by permission of the mortgagee. The jury found that there was an arrangement to that effect between the parties. The Court of Appeals, without dissent, held that the fraud in this case was to be ruled on judicially, as a question of law, and that *Edgell v. Hart*, *Frost v. Warren*, *Gardner v. McEwen*, and *Russell v. Winne* were concurrent witnesses to the existence of this rule as fundamental in the jurisprudence of New York. Said Allen, J., in pronouncing the opinion of the majority: "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of suretyship, instead of by parol or in some other way."¹

This clear statement of the distinctions between rules of substantive law and rules of mere procedure, inherent in this class of cases, was evidently designed to meet the criticisms of those who have supposed a judgment, based on facts apparent on the face of a written conveyance, to be a judgment of mere constructive or presumptive fraud. It is actual fraud that is adjudged in such cases; fraud inherent in the transaction to which the parties have agreed; and a class of fraud which is no more or less vicious and reprehensible.

¹ The case digested under the name of *Southard v. Pinckney*, in 6 N. Y. W. D. 328, is evidently the same case as *Southard v. Benner*.

sible, whatever be the character of the evidence by which the facts of the transaction are proven.

Still more recently, in *Brackett v. Harvey*,¹ the Court of Appeals has been called upon to give an equally clear explanation of the distinguishing features of those cases in which the power of sale is not reserved to the mortgager's use, but inures to the benefit of the mortgagee. The ground upon which *Ford v. Williams*,² *Conkling v. Shelly*,³ and *Miller v. Lockwood*⁴ correctly rest is clearly pointed out. It is that a sale of the goods, and the application of the proceeds upon the mortgage debt, "is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect; it does no more than to substitute the mortgager as the agent of the mortgagee, to do exactly what the latter had the right to do, and what it was his privilege *and duty* to accomplish." This is shown to be an independent doctrine of law, of equal force and dignity with the doctrine of *Southard v. Benner*, with which it in no manner conflicts. In the case under consideration, an agreement that the mortgagee should accept, as a payment on his debt, the notes taken by the mortgager for goods sold on credit, and an agreement that the proceeds of sales might in part be used to purchase new stock, which should then be covered by new mortgage for the same debt, were shown to be but modes of paying the mortgage debt, or holding the proceeds of sales subject to the lien. The validating feature of the transaction was that "in no respect did it permit anything mortgaged to escape the mortgage; if it did not turn into cash or paper, which reduced the mortgage debt, it turned into other property which became itself the subject of the mortgage lien."

¹ 91 N. Y. 214; 17 Cent. L. J. 112 (1883).

² 28 *Id.* 360.

³ 24 N. Y. 359.

⁴ 32 *Id.* 298.

These distinctions were carefully made in reversing the decision of the lower court, which had been adverse to the mortgage on the ground that in other respects the transaction indicated a reserved power of sale for the benefit of the mortgagors.¹ The Court of Appeals disagreed with the lower court in its opinion that the proof sustained this view, and reversed the case solely on the ground of the weight of evidence, saying, “we see no evidence of an agreement for such diversion (of the proceeds of sales), or of such diversion in fact.”

The two cases named thus furnish an admirable view of the doctrine under consideration, both as applied on the one hand, or found to be inapplicable on the other.

NEW HAMPSHIRE.

§ 44. The doctrine received with favor in New Hampshire.—In New Hampshire, the early case of *Coburn v. Pickering*² held that possession retained by the mortgager, under a mortgage, with the right to the full use of the property, rendered the mortgage fraudulent and void. This case went, probably, farther than necessary, inasmuch as the property mortgaged consisted of household goods, and it did not appear that their use was tantamount to their destruction. But the case is an instructive one, by reason not only of the very elaborate and well-considered opinion of the court, in which the rule we are considering is drawn from *Twyne's Case*, but also of the close and interesting argument of counsel seeking to uphold the mortgage.

This and subsequent cases have been taken as placing New Hampshire in the list of those States which adopt the rule that retention of possession alone suffices to invalidate such conveyances. Her variation of the rule was

¹ 25 Hun, 502.

² 3 N. H. 415; 14 Am. Dec. 375 (1826).

applied, in *Lang v. Stockwell*,¹ to a sale of a horse and wagon, an agreement being proven that the vendor should retain the property, pay taxes on it, and use it in all respects as his own; which use the courts held to constitute the very essence of the idea of property, and to be inconsistent with the idea of a lawful sale. It was also applied, in *Cutting v. Jackson*,² to a sale of certain live stock and some hay, in which case the agreement allowed even a more extended use of the property for the convenience of the grantor, for the hay was to be eaten by the stock. The test applied in *Twyne's Case* was taken as plainly illustrating this case also, *i.e.*, the vendor retained the property and used it as his own. It will be seen that this application of the rule covers more than mere retention of possession. It is a trust of any kind, reserved for the benefit of the mortgager, that avoids such a transaction; and, while the jury finds the facts in all cases, the fraud is predicated of those facts by the court, as matter of law, in all cases. The same rule is applied in *Winkley v. Hill*³ and *Coolidge v. Melvin*,⁴ to conveyances of land with trusts reserving a benefit to the grantor. The question of the debtor's intent is considered immaterial. "It is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they are the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case."⁵

§ 45. The doctrine adopted and applied. — On the authority of *Coburn v. Pickering*, a like rule was applied to mortgages on stocks of goods in trade with power of

¹ 55 N. H. 561.

⁴ 42 *Id.* 510.

² 56 N. H. 353 (1875).

⁵ *Id.* 520.

³ 9 N. H. 31; 31 Am. Dec. 215.

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sale reserved, in *Ranlett v. Blodgett*¹ and *Putnam v. Osgood*.² In the earlier case, Parker, C. J., referring to the provision that the mortgage should cover future acquired goods as additions to the stock, thus aptly supplemented the criticisms of other courts upon the uncertain and shifting character of such transactions: "If this doctrine were admitted, a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn, but unlike that instrument in that the materials would not remain the same."³ The result of the arrangement, the court conceived to be that the grantor "was the owner, by the agreement, for all purposes except the rights of creditors;" a description which at once characterized the transaction as fraudulent.

In *Putnam v. Osgood*, which was twice reported,⁴ it appeared that the mortgage was given and received in good faith, and that there was no contemporaneous agreement that the mortgager should continue selling; nevertheless, he did so continue, and with the knowledge of the mortgagee; and these facts, when proven, were held to establish fraud in law. This case as last reported holds, that wherever, by any such arrangement, there results, as here, a secret trust for the benefit of the grantor, "it is well settled in New Hampshire that the fraud is a conclusion of law," and this, "without stopping to inquire what were the real motives and intentions of the parties."⁵ This last of the two decisions in this case, though less full, is in complete accord with the first, where Chief Justice Bellows thus summed up the vital features of this class of conveyances.⁵

"The avowed object of a mortgage is to secure a debt. If the secret purpose be to protect the mortgager in the enjoyment of the property, and enable him to set his other

¹ 17 N. H. 298; 43 Am. Dec. 603 (1845).

⁴ 52 *Id.* at p. 154.

² 51 *Id.* 192 (1871); 52 *Id.* 148.

⁵ 51 *Id.* at p. 202.

³ 51 *Id.* 192, and 52 *Id.* 148.

creditors at defiance, then the mortgage is deemed to be fraudulent and void as to those creditors ; and of this there is no controversy. If a trust, inconsistent with the legitimate purpose of a mortgage, is reserved for the benefit of the mortgager, and that is proved, then a fraudulent intent is, with us and in many other jurisdictions, a conclusion of law. A secret understanding that the mortgager shall retain the possession of the goods, and continue to sell them as before for his own benefit, is clearly such a trust. As between the parties, the mortgager remains the owner of the goods, and the mortgage is practically effective only to ward off the claims of other creditors. If such a mortgage should be held to be valid, it would furnish the readiest means of affording shelter to an embarrassed debtor, under which he could carry on his business and defy his creditors. The practical effect of such a mortgage is to delay and defeat creditors, and it is to be presumed that the parties intended to do what their acts were naturally calculated to accomplish.

“ The right of other creditors to attach the mortgaged property could afford but little relief against these mischiefs. It could only be done by paying the mortgage debt, which, in many instances, would leave little or nothing for the creditor. In the meantime, the mortgager would dispose of the goods for his own benefit and without paying the mortgage debt, and then mortgage the goods, obtained to replenish his stock, to the same friend for the same debt, and so continue his business and be enabled to snap his fingers at his other creditors.

“ A doctrine which should hold such a transaction to be valid would be most disastrous in its consequences, and finds no countenance in the established doctrines on the subject, either here or elsewhere.”

§ 46. **Distinction in case of agency for the mortgagor.**— The rule is recognized in its application to mort-

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gages on stocks of goods in trade, as the existing rule in New Hampshire, in the recent case of *Wilson v. Sullivan*;¹ but in this case, the sales of goods having been made by the mortgager as the agent and for the benefit of the mortgagee, and for the purpose of extinguishing the mortgage debt, it was naturally held, in accordance with the ruling in other States, that such a transaction is valid in law, if free from fraudulent intent.

The doctrine is also recognized in a different aspect, in another case in the same volume.²

OHIO.

§ 47. Collins v. Myers; the doctrine illustrated in Ohio. — The Supreme Court of Ohio, though later in point of time, was in no respect less incisive in its judgment upon such transactions, and no less felicitous in illustrating their pernicious character, than those of the other States already referred to. The case of *Collins v. Myers*³ has justly been assigned a leading position among those treating of the subject. It was a contest in equity between the assignees under a mortgage and judgment creditors of the mortgager, who had continued to traffic with the stock of goods mortgaged; though the agreement permitting this appeared, not on the face of the instrument, but by proof *aliunde*. That the question arising out of these facts far transcends that of mere possession, is clearly shown. The language of the opinion has deservedly become proverbial. “The object of a mortgage is to obtain a security beyond a simple reliance upon the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor being swept off by other creditors, by fastening a specific lien upon that covered by the mortgage. But a

¹ 58 N. H. 260; 9 Reporter, 614 (1878).

² *Petree v. Dustin*, p. 309; see *post*, sect. 144.

³ 16 Ohio, 547 (1847).

mortgage, with possession and power of disposition in the mortgager, is nothing at last but a reliance upon the honesty of the mortgager; and, in fact, is no security, as it is within the power of the mortgager, at any moment, to defeat the mortgage lien by an entire disposition of the whole property covered by the mortgage. Such a mortgage, then, is no security, so far as the debtor is concerned, and is of no benefit except as a *ward* to keep off other creditors." "The very nature of a mortgage is to fasten a lien upon specific property; and the courts have gone far enough when they have permitted an honest possession in the mortgager. * * * But in this case there is no specific lien, but a floating mortgage, which attaches, swells, and contracts as the stock in trade changes, increases, and diminishes; or may wholly expire by entire sale and disposition, at the will of the mortgager. Such a mortgage is no certain security upon specific property."

"In such case the whole right to dispose of the property to pay a debt depends upon the will of the debtor, not affected by the rights of the mortgagee; and what reason is there in permitting the will of the debtor to determine whether property shall legally go to pay a debt or not? If it be the will of the debtor to appropriate the mortgaged property to pay the debt, it is binding as against the mortgagee; but if it be not the will of the debtor, and the property is seized upon execution, the rights of the mortgager fasten upon the property, and take it away from the execution creditor. Then the property is not held by the mortgage, but by the will of the debtor; because, if the debtor sees proper to dispose of it, he has the power under the mortgage. He may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and you seize the property in execution against his will, the mortgage steps in and restores it to the debtor. The whole matter, then, appears to rest upon the option of the debtor, to ap-

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propriate the mortgaged property to the payment of his debts or not, and not upon the mortgage. No reasoning will change this result if a mortgager retains possession and the full power of disposition over the mortgaged property."

"A mortgage upon a specific article, with possession and power of disposition left in the mortgager, is in truth no mortgage at all; it is no certain lien. The power to hold possession and dispose of the property is inconsistent with the very nature of a mortgage. It, indeed, would not, perhaps, be going too far to say that such an instrument was a nullity."

"As to all the world except the parties themselves, such a mortgage will be held void as against the policy of the law."

The court dissented explicitly from the doctrine enunciated by Mr. Justice Story, in *Mitchell v. Winslow*,¹ and, referring to his suggestion, that though part of the goods should be lost to the creditor by sales, others might be substituted by consent, replied: "This is no answer, for it may be that others will *not* be substituted, and, if we look to experience, in all cases where a trader has felt himself bound to mortgage his whole stock, it is not the usual result." The fallacy adopted by a class of logicians represented by Story and Lowell is then pointed out. "The whole error appears to be in regarding the word *stock* as a fixed thing which must always remain, the same as a horse which preserves his identity, although in process of time every particle composing him may be thrown off and renewed." "The error is in treating a *word* as a *thing*, mortgaging a word instead of a substance, and permitting the *substance* to be sold, while the mortgage attaches and remains fixed to the word."

§ 48. The doctrine adhered to.—The doctrine thus comprehensively stated remains the law in Ohio. Freeman

¹ 2 Story, 630.

v. Rawson¹ was another case where the agreement that the mortgagor should continue to sell the merchandise mortgaged, appeared *dehors* the instrument; but the lower court is sustained in its ruling that the instrument was equally fraudulent and void as if this arrangement had appeared on its face. The ruling in Coburn *v.* Pickering, as to a secret trust, is referred to and approved, and it is said: "The mortgage must be precisely what it purports and professes to be, and must operate an absolute surrender of the property for the security of the mortgagee." "What possible arrangement could be more directly inconsistent with the nature and purposes of the conveyance, or could more palpably secure to the mortgagor all the beneficial uses of the property, than the power to use and dispose of it for his own benefit? It is simply and plainly saying that, as between the parties, the mortgagor's enjoyment of and dominion over it shall be no less than before, while it is put beyond the reach of other creditors."

In Harman *v.* Abbey² the mortgage provided nominally that the mortgagee should have possession, but only as against all other persons than the mortgagor, and the latter was to continue the business at retail; while no provision was made as to the proceeds of sales, except as to paying expenses. This arrangement, which merely expressed more plainly in terms what the court discovered lurking under the surface of the two last named cases, was, in accordance with the previous ruling, declared absolutely void in law.

Goodenough *v.* Harris³ and Morris *v.* Devon⁴ are cases in which the same ruling was applied in the inferior courts.

It is to be observed particularly that before Collins *v.* Myers, the rule was already well established in Ohio that retention of possession alone, after a bill of sale of chatt-

¹ 5 Ohio St. 1.

² 7 Ohio St. 218.

³ 1 Disney, 53.

⁴ 2 *Id.* 218.

tels, whether absolute or conditional, would furnish only presumptive evidence of fraud, and might be consistent with an honest intent, or open to explanation.¹ This rule was adopted at a time when, while it was approved in New York, it had been rejected by Pennsylvania, Connecticut, and Vermont, which States had applied the contrary rule of conclusive fraud to such cases.

§ 49. Distinction in case of agency for the mortgagee.—Brown *v.* Webb² and Kleine *v.* Katzenberger³ do not vary the rule adopted in Collins *v.* Myers. In the former case, the mortgage provided that the mortgager should make sales for the purpose of paying the mortgage debt, but the mortgagees took immediate possession, and themselves carried out this provision, which was held a valid transaction. In Kleine *v.* Katzenberger, the provision of the mortgage was that the mortgager might sell, but only in order to raise money to pay over to the mortgagees on their debt, and the court followed the New York courts in distinguishing this as a valid transaction, the power of sale being allowed only for the benefit of the mortgagees, and being “entirely consistent with the idea of a lien upon the goods for the security of the mortgagees,” when the arrangement is made in good faith.

MINNESOTA.

§ 50. The doctrine adopted in Minnesota; registration of instrument immaterial.—In Minnesota, a similar ruling was made as to a mortgage on a stock of goods in trade, in the first reported case of Chophard *v.* Bayard.⁴ The doctrine of the New York cases was approved, and it was held that permission to the mortgager to sell the goods is wholly inconsistent with the idea of a *security*, and leads the judi-

¹ Hombeck *v.* Vanmetre, 9 Ohio, 153 (1839).

² 20 Ohio, 389.

³ 20 Ohio St. 110; 5 Am. Rep. 630 (1870).

⁴ 4 Minn. 533.

cial mind irresistibly to the conclusion that the instrument was made for some other purpose.

This doctrine was followed in *Horton v. Williams*,¹ a case of a mortgage on stock and farm produce, some of which the mortgagee had allowed the mortgager to sell. The rule was laid down in this case, (and also in *Gere v. Murray*²,) that the province of the jury is to find only the facts as to the acts or intent of the parties, and that the court is to declare whether such acts or intent are fraudulent, as a question of law. In case the intent of the parties be inconsistent with the idea of an honest *security*, “the law declares such intent fraudulent.” The case of *Chophard v. Bayard* was said to be “in accordance with sound principle and the weight of authority,” in holding “that such a mortgage was necessarily fraudulent, as against the mortgager’s creditors.” In reference to the question of registration, as affecting this doctrine, the court said, further: “The law, as held in *Chophard v. Bayard* and *Gere v. Murray*, has not been changed by the act requiring chattel mortgages to be filed, unless accompanied by immediate delivery, and followed by an actual and continued change of possession of the things mortgaged. Unlike the statutes of Massachusetts and Iowa on this subject, our statute does not make the filing of the mortgage legally equivalent to actual delivery and continued change of possession; but like the statute of New York, of which it is a copy, ‘it merely adds another to the grounds on which a mortgage of personal chattels shall be void.’”³

§ 51. Transaction not validated by act of mortgagee in taking possession of goods. — The rule was further affirmed in *Stein v. Munch*,⁴ as to a mortgage on a retail

¹ 21 Minn. 187.

² 6 *Id.* 305.

³ Citing *Wood v. Lowry*, 17 Wend. 492, and *Smith v. Acker*, 23 *Id.* 658.

⁴ 24 Minn. 390 (1878).

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stock of drugs with power of sale reserved. In this case, it was held that the transaction was not validated by the mortgagee taking possession of the goods under and by virtue of the mortgage; for which important principle the cases of *Robinson v. Elliott*,¹ *Delaware v. Ensign*,² *Blakeslee v. Rossman*,³ and *Janvrin v. Fogg*⁴ were cited, all which save the last were similar cases of mortgages on stocks of goods in trade.

But in another case of a similar mortgage, heard at the same term,⁵ in which the mortgager had, by a new act, voluntarily turned the property over to the mortgagee, for the purpose of paying in part the mortgage debt, this was sustained as a valid and legal transaction, it appearing to be *bona fide*.

The rule was reaffirmed as the settled law of Minnesota, in *Mann v. Flower*,⁶ where a similar mortgage on goods in trade was held fraudulent; the same mortgage having been, in *Flower v. Cornish*,⁷ held valid as between the parties. In this as in the preceding cases, the adjudication proceeds on the theory of the fraudulent intent of the parties, as conclusively proven by their dealings.

WISCONSIN.

§ 52. The doctrine applied in Wisconsin; intent of parties immaterial. — The Minnesota court, in *Horton v. Williams*, refers approvingly to *Place v. Langworthy*⁸ and *Steinart v. Deuster*,⁹ two cases in Wisconsin, involving mortgages of this character. *Place v. Langworthy*, in its turn, is professedly based on *Collins v. Myers*,¹⁰ the language of which is quoted and adopted. In this case the

¹ 22 Wall. 513.

⁶ 25 Minn. 500 (1879).

² 21 Barb. 85.

⁷ 25 *Id.* 473.

³ 43 Wis. 116.

⁸ 13 Wis. 629 (1861).

⁴ 49 N. H. 340.

⁹ 23 *Id.* 136.

⁵ *Bank v. Anderson*, 24 Minn. 435.

¹⁰ 16 Ohio, 547.

provision for sales was exhibited on the face of the mortgage. In *Steinart v. Deuster*, it appeared to have been agreed on verbally between the parties. But the two cases were held to be not distinguishable in this particular. The duty of the court was recognized, so soon as the fact is conceded or established in the case, to expose the inherently vicious tendencies of such a transaction, and to rule upon it as fraudulent in law. Allowing sales of the mortgaged goods by the mortgager is said to be “a provision directly calculated, in our judgment, to hinder, delay and defraud creditors.”¹ A verbal agreement to this effect is no less vicinus than a written one.

These cases established the doctrine in Wisconsin. In *Oliver v. Town*,² the trial court charged the jury in conformity to the rulings in the two earlier cases; and on appeal, the judgment resulting therefrom was sustained without discussing the propriety of such a charge.

The Supreme Court of Wisconsin has lately been invited to revise these rulings, but it has by a full bench adhered to them in the most decided manner, in *Blakeslee v. Rossman*;³ announcing that “the validity of such a mortgage is not an open question in this State,” and expressing the belief that the rule elsewhere “is very generally, if not universally, the same as here.” The terse and incisive language of Ryan, C. J., is calculated to give this case a leading position on the subject. He said: “Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, *bona fide* or *mala fide*, is immaterial to an instrument *per se* fraudulent and void in law. The fraud which the law imputes to it is conclusive. * * * Fraud in fact imputed to a contract (valid on its face) is a question of evidence; not fraud in law. And no agreement of the parties in parol can aid a written instrument, fraudulent and void in law.”

¹ 18 Wis. 629.

² 28 Wis. 328.

³ 43 Wis. 116 (1877).

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It being urged upon the court that a seizure of the goods in this case by the mortgagee, claiming under the mortgages, had given him a valid possession, this claim was overruled in decisive language, it being considered impossible for the mortgagee to acquire any legal rights under a transaction so fraudulent.

§ 53. Distinction in case of agency for the mortgagee; recent cases. — The still later case of *Fisk v. Harshaw*¹ exhibited the fact of sales of the mortgaged goods by the mortgager; but it turned upon the question of the weight of evidence, as to whether the mortgagee had allowed the mortgager to apply any of the proceeds of the sales to his own use; it was claimed that the proceeds were all to be remitted to the mortgagee; and the finding in the lower court in favor of the mortgagee on these points was sustained, upon the weight of evidence, by the majority of the court, without withdrawing or detracting from the authority of *Blakeslee v. Rossman* or the preceding cases. *Cotton v. Marsh*² was cited and approved, where the mortgagee of a stock of goods, by his agent, put the mortgager in possession, with instructions to sell and remit the proceeds; and this was held to be an arrangement not necessarily fraudulent, but valid if free from fraudulent intent.

On similar principles, sales of mortgaged chattels by the mortgager, without the knowledge or consent of the mortgagee, will not have the effect to avoid the mortgage.³

The recent case of *David v. Birchard*⁴ involved a chattel mortgage on a stock of goods, but the report does not disclose any reservation by the mortgager of a power of sale of the goods, and the case was litigated on the question of fraudulent intent.

In *Rice v. Jerenson*,⁵ though the mortgage was one of a

¹ 45 Wis. 665 (1878).

⁴ 53 *Id.* 492.

² 3 *Id.* 221 (1854).

⁵ 54 *Id.* 248.

³ *Barkow v. Sanger*, 47 *Id.* 500.

stock of goods with a reserved power of sale, the question of inherent fraud in such a conveyance was not involved or discussed ; the only question in connection with the conveyance being whether it furnished sufficient proof of an intent to defraud to warrant the issuance of a statutory attachment. The evidence showing no intent to defraud, no ground appeared for the attachment, which was accordingly dissolved. This case thus illustrates in another form the entire immateriality of the intent of the parties, in determining the fraudulent character of a reserved power of sale. Though the mortgage in question was essentially fraudulent, under *Blakeslee v. Rossman*, it yet furnished no proof whatever of fraudulent intent.

ILLINOIS.

§ 54. The doctrine applied in Illinois ; registration of instrument immaterial. — In Illinois it was urged upon the consideration of the Supreme Court, in *Davis v. Ransom*,¹ that the statute of that State allowing possession by the mortgager of chattels for two years, in case the mortgage be recorded, had, as intimated by Lowell, J., in *Brett v. Carter*, met all the difficulties of *Twyne's Case*, so as to validate the mortgage in question. But the court was not blind to the fact that possession and publicity were minor matters, compared with the reservation of a power of sale ; and the difference was plainly pointed out. Said the court : “ The statute contemplates the retaining of possession by the mortgager of *chattels capable of description and identification* only, and the retaining of such possession for use or *custody*, and not for sale and disposition in the course of business and trade.” This accords with the ruling in *Horton v. Williams*,² that such statutes do not change the rules of the common law, but “ merely add another to the grounds on which a mortgage of chattels shall be void.”

¹ 18 Ill. 396 (1857).

² *Ante*, sect. 50.

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In *Davis v. Ransom* a stipulation on the face of the mortgage allowed the mortgager to sell the goods in the usual course of trade, with a proviso that the proceeds should be paid over to the secured creditors. The mortgager had paid over certain of the proceeds to one of said creditors, and thus far had manifested an intent not fraudulent. Notwithstanding this, the inherent vice of the arrangement was relentlessly exposed by the court. “ This instrument does not provide for possession *remaining* with the mortgager within the meaning of the statute, but seeks, under cover of a mortgage, to enable the mortgager, in defiance of his creditors, to retail goods according to the course of merchants, and is against the evident policy of the statute. In effect, this instrument is no less than an assignment or bill of sale of a stock of goods, reserving to the assignor the absolute dominion and power of disposition for the period of fifteen months, during which time it contemplates that the assignor shall, with the goods, carry on his business of storekeeping as by him heretofore followed ; that what he should add to the stock should enure to, and become a part of, the assigned or mortgaged property ; and that, for this period, the creditors of the assignor should be hindered in subjecting the property to the satisfaction of their legal demands. * * * The law gives no sanction to such arrangements, and, however well intended *in fact*, will hold them void as against creditors, as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands.”

Read *v. Wilson*¹ was a like case, with a like clause in the mortgage ; but here the mortgagees had, in fact, taken possession under the mortgage before the contest arose, even before the execution creditor had taken out his execution, and they had commenced and continued for some time the sale of the goods for the satisfaction of their debt ; and the

¹ 22 Ill.3 77.

court held that they were protected by their possession under the circumstances of the case, without abandoning the principles settled in the former case.

In *Barnet v. Fergus*¹ the mortgage covered a "stock in trade" among other things, but did not on its face grant permission to the mortgager to sell the goods; this permission appeared by evidence to have been given *aliunde*. The court re-affirmed its decisions that such an agreement on the face of the instrument amounted to "fraud in law;" and, as to the particular case, held that such permission granted "would be such a perversion of the mortgage from its legitimate purposes as to withdraw from its protection, and place within the reach of other creditors, all the property which the mortgagee had permitted the mortgager to *hold for sale* in the ordinary course of his business."

This court had previously decided, in *Ogden v. Stewart*,² that in a case like *Barnet v. Fergus*, all lien of the mortgage is lost by a sale of the goods, and that the vendee from the mortgager acquires a title to them. In the last named case, the distinction is taken that as the mortgage was on its face free from any imputation of a fraudulent agreement, the permission by the mortgagee that sales be made by the mortgager affected his lien only as to that portion of the goods allowed to be sold, and it was unaffected as to those goods which were not, directly or by implication, covered by the permission to sell.

§ 55. The doctrine adhered to in Illinois. — *Cleaves v. Herbert*³ might possibly induce doubts as to the intention of the Illinois Supreme Court to adhere to this rule. The case was a chattel mortgage on a stock of liquors and saloon furniture and fixtures, contained in a "saloon," the grantor to "retain possession of said property, and at his own expense to keep, and to use and enjoy the same until de-

¹ 51 Ill. 352.

² 29 *Id.* 122.

³ 61 *Id.* 126.

fault," etc. The Appellate Court could not see that to "keep, use and enjoy" this property was designedly to allow the grantor to sell it, but thought it possible the jury had considered the keeping of the liquors intact for the purpose of improvement by age, the "use" of it meant in the conveyance. Hence the verdict of the jury in favor of the transaction, upon conflicting evidence, was allowed to stand. But doubtless, this case, like *Fisk v. Harshaw*¹ and *Yates v. Olmstead*,² is to be taken only as an adjudication upon the province of the jury to settle disputed questions of evidence; inasmuch as we find this court, less than four years later, holding, in *Simmons v. Jenkins*,³ that any such arrangement between mortgager and mortgagee, whether express or implied, even if proven by circumstances, to allow sales at retail by the mortgager, will render the conveyance unavailing as against creditors. There is also a plain adherence to the rule of *Barnet v. Fergus*, in the later case of *Goodheart v. Johnson*,⁴ where the same court sustain the conveyance then in dispute; carefully distinguishing the case from *Barnet v. Fergus* by the fact that the sale made in this case was for the express account of, and under the direction of the mortgagee, except in three instances where inconsiderable portions of the property were sold by the mortgagee for his own benefit, which were thought not sufficient to invalidate the otherwise legal transaction.

But the question is placed beyond doubt by the more recent cases of *Greenebaum v. Wheeler*⁵ and *Dunning v. Mead*,⁶ both decided at the September term, 1878. In *Greenebaum v. Wheeler* the chattel mortgage was on the materials and stock in business of a carriage factory, the mortgager continuing the business and making sales, and retaining a certain sum per month for the use of himself and

¹ *Ante*, sect. 53.

³ 76 Ill. 479.

⁵ 90 *Id.* 296.

² *Ante*, sect. 41.

⁴ 88 *Id.* 58.

⁶ 90 *Id.* 376.

family. The court said: "If this was not intended to defraud other creditors, it certainly was well calculated to do so, as it placed all of Keach's property beyond their reach for fifteen months, and enabled him to carry on his business with the property precisely as though it was not encumbered. * * * Such a transaction must be held to be against the policy of the law, as tending to delay and defraud creditors. If such mortgages or pledges were sanctioned, it would form one of the most convenient and effectual means of hindering and delaying creditors in collecting their debts that could be devised." In Dunning *v.* Mead, the mortgage covering a stock in trade was valid on its face, inasmuch as it did not stipulate for sales by the mortgagors. But on the day after its execution, the mortgagees, by letter, authorized the mortgagors to continue to sell the mortgaged property at retail, and retain the proceeds subject to their order. It appeared in proof that this was used as a cover to enable the mortgagors to appropriate the proceeds to their own use. The court sustained the instruction to the jury that this mortgage was void as to creditors, saying that it had "been repeatedly held by this court" that such a transaction was fraudulent, and referring to the cases above cited.

MISSOURI.

§ 56. **The doctrine as applied in Missouri.** — The Supreme Court of Missouri at first held that sales unaccompanied by possession, whether absolute or conditional in their terms, were in law fraudulent and void *per se*, independent of statutes respecting fraudulent conveyances, and independent of the intentions of the parties. See Rocheblave *v.* Potter,¹ Foster *v.* Wallace,² Sibly *v.* Hood,³ and King *v.* Bailey;⁴ these decisions extending over the period from

¹ 1 Mo. 561; 14 Am. Dec. 405.

² 2 *Id.* 231.

³ 3 *Id.* 290.

⁴ 6 *Id.* 575.

1825 to 1840. But in 1841 this rule was completely abandoned, and in *Shepherd v. Trigg*,¹ *Ross v. Crutsinger*,² and *King v. Bailey*,³ the contrary rule was established that possession left with the vendor raises no question of fraud in law, but merely a question of fraud in fact, to be submitted to the jury. It is somewhat remarkable that *King v. Bailey*, in 6 Mo., appears to be the same case which is decided in a precisely opposite manner in 8 Mo. When this court, in 1848, was confronted with a case of a trust deed on a stock of goods in trade, it was at first evidently embarrassed by the prominence given in its earlier decisions above cited to the question of possession alone; and was led to sustain the transaction in question on the ground that no provision for sales by the grantor appeared on the face of the deed, notwithstanding the fact appeared that sales at retail were regularly made with the assent of the creditor.⁴ But in subsequent cases in which the power of sale was reserved to the grantor on the face of the instrument, this was held fraudulent and void in law, there being no question of fact to go to the jury;⁵ even in case the instrument bound the grantors to apply the proceeds of sales to the replenishment of the stock;⁶ and, also, where the vicious provision does not appear in terms on the face of the deed, but is necessarily implied from other provisions, as in *Stanley v. Bunce*⁷ and *Billingsley v. Bunce*,⁸ where the deeds covered all the merchandise, which the grantor might "at any time within twelve months purchase for the purpose of renewing or replenishing said stock." This clause, it was held, necessarily implied that the grantor "should retain possession of

¹ 7 Mo. 151.

⁶ *Walter v. Wimer*, 24 *Id.* 63.

² 7 *Id.* 245.

⁷ 27 *Id.* 269.

³ 8 *Id.* 332.

⁸ 28 *Id.* 547.

⁴ *Milburn v. Waugh*, 11 *Id.* 369.

⁵ *Brooks v. Wimer*, 20 *Id.* 503; *Martin v. Maddox*, 24 *Id.* 475; *Martin v. Rice*, 24 *Id.* 581.

his goods and proceed with his business as a merchant." These principles are reaffirmed in *Armstrong v. Tuttle*¹ and *Lodge v. Samuels*,² and so stands the law in Missouri. It is true the Supreme Court of this State found itself, in *State v. Tasker*³ and *Voorhis v. Langsdorf*,⁴ embarrassed in construing deeds that covered goods "which may be added from time to time to said stock," and "all things whatsoever now, or that may be hereafter, used, bought, or belong to the said party of the first part in the course of his usual trade or business;" and was unable to find in these provisions an intent, necessarily implied, to reserve the power of sale in the usual course of business. So the instruments in these cases were upheld, while the principle governing the earlier cases was still recognized. But the court had, in *Reed v. Pelletier*,⁵ applied the rule that an agreement of the grantee to allow the grantor to continue selling the goods, could be established by very slight evidence, so as to defeat the conveyance; and in *Hall v. Webb*,⁶ Napton, J., who prepared the opinions in the two cases in 31 Mo., had expressly disavowed the authority of Judge Story's opinion in *Mitchell v. Winslow*,⁷ and antagonized his views. *Lodge v. Samuels*, in its turn, had tended to a renunciation of the exceptions adopted in *State v. Tasker* and *Voorhis v. Langsdorf*. There the mortgage conveyed "the entire stock in the broom-making business lately owned by" the grantors, "consisting of all the broom-corn on hand, and all the brooms and machinery," and left the grantors in possession. From these recitals the plain meaning was inferred that the grantors were to continue to manufacture and sell brooms; and the deed was declared fraudulent and void upon its face.

¹ 34 Mo. 432.

⁵ 28 *Id.* 173.

² 50 *Id.* 204 (1872).

⁶ 28 *Id.* 408.

³ 31 *Id.* 445.

⁷ 2 Story, 630.

⁴ 31 *Id.* 451.

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But in the later cases of *Weber v. Armstrong*¹ and *Hewson v. Tootle*,² this court disregarded *Lodge v. Samuels* on this point, and returned to the exceptions announced in *State v. Tasker* and *Voorhis v. Langsdorf*. It is plain, however, that the distinctions introduced by these decisions into the jurisprudence of Missouri are technical, and relate to the questions of evidence and procedure, and in no way affect the substantial law of the subject. The substantive rule adopted in the earlier cases is expressly recognized and approved. But it is considered that the court should draw no conclusions from certain equivocal language in the deed, because it is so easy to introduce evidence as to the extent to which sales were actually made by the mortgager, and then let the jury find the facts. In *Voorhis v. Langsdorf*³ it was said: “The court is not called upon or warranted in pronouncing a deed void upon a mere conjecture. It is easy to show, *aliunde*, how the truth is, and go to the jury on the facts. If they are satisfied that this was the understanding and intention of the parties, where the deed may be silent on the subject, the same result follows as though there was an express or implied stipulation in the instrument. The jury will pronounce it void, under instructions from the court, if the evidence warrants such a conclusion.” And this was the purport of the distinctions taken in the later cases above referred to. In *Weber v. Armstrong*, where there was no evidence, outside the instrument, of an agreement to allow sales, the court found “not a syllable in the instrument from which it can be fairly implied, much less from which it must necessarily be implied, that the grantors were to have the power to sell.” In *Hewson v. Tootle*, the court found considerable evidence to support the view that the sales were allowed only to raise money to be applied on

¹ 70 Mo. 217 (1879).

² 72 Mo. 632 (1880).

³ 31 Mo. 451.

the mortgage debt. In the first case, the judgment was reversed and the case was remanded for a new trial, in conformity with the law as stated in *Brooks v. Wimer*, *Stanley v. Bunce*, and *Billingsley v. Bunce*, namely, that if "the grantor is to retain possession with a power of sale, the court will declare the deed to be void as a matter of law;" which rule was in no way affected by anything said in the last named case of *Hewson v. Tootle*.

§ 57. The doctrine adhered to ; intent of parties immaterial. — The rule of *Brooks v. Wimer* and the earlier cases was expressly affirmed and applied in *White v. Graves*,¹ to a case where the goods mortgaged were to be retained by the mortgager "as stock in trade," from which it appeared to the court that "the goods were to remain in possession of the grantor and be disposed of in the usual course of business." It was applied also as settled law, by the St. Louis Court of Appeals, in *State v. Jacob*,² *Cator v. Collins*,³ and *State v. Mueller* ;⁴ and it was recognized as such in *Greeley v. Reading*.⁵

Throughout these cases in Missouri runs the idea, distinctly expressed, that the applicability of this rule does not depend in any manner upon the intentions of the parties. Frequently, it is expressly declared as a distinct rule of law, that the tendency of these transactions is fully as fraudulent as would be a fraudulent intent of the parties; these two elements of actual fraud being clearly distinguished.⁶ In *State v. Mueller*,⁷ the language of the court was: "The intentions of all parties may have been excellent, but the arrangement is one which the law will not allow an insolvent debtor to make."

¹ 68 Mo. 218 (1878).

³ 2 Mo. App. 225.

² 2 Mo. App. 183 (1876)

⁴ 10 *Id.* 87.

⁵ 74 Mo. 309 (1881).

⁶ *State v. Tasker*, *State v. Jacob*, *Brooks v. Wimer*, *supra*; *State v. D'Oench*, 31 Mo. 453.

⁷ 10 Mo. App. 87.

Thompson *v.* Foerstel¹ was distinguished from the cases above referred to, by the circumstance that the power of sale of the property (consisting of horses, cattle, wagons, and farm utensils) was to be exercised only by consent of the mortgagee, and the proceeds thereof were all still to remain under the lien; which arrangement was sustained as valid. In Nash *v.* Norment,² where the mortgage itself was declared invalid as a security, the new transaction of the delivery of the property was held to give the mortgagee a title thereto.

§ 58. **Limitations upon the application of the rule.**—If it be stipulated that all the proceeds of sales made by the grantor while he remains in possession, shall be applied to the payment of the debts secured, presumptions will in Missouri be in favor of the transaction, and it will be sustained in the absence of evidence tending to show that the proceeds of sales were not so applied.³

The application of the rule in Missouri, is in practice subject to the limitation that the fraudulent mortgage will be void only as to those goods which are subject to such a power of sale, and will be valid as to the residue;⁴ a doctrine which is disallowed in some of the States.

TENNESSEE.

§ 59. **Early cases in Tennessee.**—**Conflicting decisions.**—In Tennessee, early cases had applied a similar rule to mortgages upon property consumable in the use, holding that the reservation of possession and use in such cases was necessarily a reservation for the benefit of the debtor, and therefore fraudulent;⁵ and those decisions

¹ 10 Mo. App. 290.

² 5 Mo. App. 545.

³ Metzner *v.* Graham, 57 Mo. 404; Hewson *v.* Tootle, *supra*.

⁴ State *v.* D'Oench, 31 Mo. 453; Donnell *v.* Byern, 69 Mo. 468.

⁵ Sommerville *v.* Horton, 4 Yerg. 540; 26 Am. Dec. 242; Simpson *v.* Mitchell, 8 Yerg. 416.

were followed as authority in Alabama, Massachusetts, Missouri, Mississippi, and other States—in some of them being relied on as applying in principle to the cases of mortgages on stocks of goods. It, therefore, appears singular that, in respect to the latter class of cases, there should have been any doubt or vacillation exhibited in the Tennessee decisions. But the reservation to the use of the grantor by way of sale of the mortgaged goods has not always appeared as clear to the Supreme Court of this State as has the reservation, intrinsically no plainer, by way of use and consumption. In the first case which arose, *Galt v. Dibrell*,¹ it took but few words to determine, without reference to authorities, that a reserved power of sale made such a mortgage fraudulent and void in law, though there was no fraud in fact, and nothing more was intended than an honest design to secure a just debt; because such a reservation “is totally inconsistent with the rights of other creditors, and of necessity vitiates” the transaction. In *Peacock v. Tompkins*,² the deed of trust secured, besides certain *bona fide* debts, an indebtedness which was created only to represent a sum to be advanced to the grantor for the support of himself and family, and for the further conduct of his business; and it was declared to be for this reason fraudulent by operation of law, without reference to the intention of the parties.³

*Saunders v. Turbeville*⁴ tended to a contrary rule, though not decisive. There a sort of qualified joint-possession between the grantor and trustee was provided for; but, in fact, the grantor had possession and control for his own purposes and benefit, without regard to the deed of trust. The arrangement was sustained as a valid security, on the

¹ 10 Yerg. 145 (1836).

² Meigs, 317 (1838).

³ See a similar case in Conn., cited in sect. 80.

⁴ 2 Hum. 272.

ground that the debtor's offence in using the property for his own benefit was a slight one, and was committed without the knowledge or assent of the creditors secured by the deed of trust.

But in *Doyle v. Smith*,¹ where the terms and circumstances of a general assignment for creditors, to a trustee who took possession, showed that the main object of the transaction was the continuance of the debtor's business, the plain intent to reserve a benefit to the latter was held sufficient to vitiate the entire transaction. The pendulum oscillated to the other extreme in *Hickman v. Perrin*,² where the objections to a reserved power of sale were abandoned, and a mortgage on a stock of goods was sustained on the two grounds, drawn from the Michigan case of *Gay v. Bidwell*,³ first, that no creditors appeared with claims older than the mortgage, and that subsequent creditors could not complain of the transaction, (as if it were like a voluntary conveyance), and second, to hold that a merchant could not make such a mortgage without closing his doors would be to hold that no merchant could mortgage his stock.

§ 60. The question settled ; *Bank v. Ebbert*, and later cases. — But all these aberrations have been corrected in the case of *Tennessee National Bank v. Ebbert*,⁴ where a trust deed upon a stock of goods allowed the grantors to continue their business, making sales as before, and to replenish their stock from time to time, but professed to make this “ subject to all the provisions of the trust.” In a full and logical opinion, the characteristics of such mortgages are freely and thoroughly examined, and the correct rule is laid down with such perspicuity as to give to this case a leading position on the subject. The peculiar views ad-

¹ 1 Cold. 15.

² 6 Cold. 135.

³ 7 Mich. 519.

⁴ 9 Heis. 153; 2 So. Law Rev. (1st series) 175, (1872).

vanced in *Hickman v. Perrin* are expressly repudiated. It is said: "Admitting that there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet here are such *facilities for fraud*, contracted for on the face of the deed, that it must be held as wanting in legal good faith, on the plain principle that every reasonable man is presumed to intend the probable consequences of his own acts; and, besides, there is clearly a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors." "We hold that the deed of trust in question cannot be sustained, on the plain principle that *it does hinder and delay creditors* in the enforcement of their claims, not by a *bona fide* appropriation of the property of the debtor to the payment of his preferred creditor, which would be allowable, but by placing it in his own possession and control, with absolute power of disposition, and the means of using the proceeds for his own benefit, as before the conveyance; and that such stipulations are not only inconsistent with the idea of a mortgage, but *tend inevitably to give a fraudulent advantage* to the debtor over his other creditors, while his property is protected by being in the name of a trustee." "The rule we lay down in this case requires only that there be a *bona fide* and certain appropriation of the property for the benefit of a creditor; not a colorable one, in which the creditors have only a *contingent interest*, dependent on the good faith of the assignor, while the assignor himself has an equally certain interest secured to him."

This rule remains the law in Tennessee. It was applied in the case of *Woodward v. Goodman*,¹ to a somewhat different instrument, in which, however, the reservation for the grantor appeared in the provision allowing him to continue to use the property conveyed by deed in trust, while the trustee could not sell it, and the creditors could thus

¹ 3 Cent. L. J. 43.

have, not the property, but only the profits derived from its use, subjected to their demands. Under the principles settled in *Doyle v. Smith* and *Bank v. Ebbert*, this trust-deed was declared void on its face.

The rule was again expressly applied in the later case of *McCrasly v. Hasslock*,¹ where, after stating the nature and character of the transaction between the parties, the case of *Bank v. Ebbert* is referred to as an authority conclusive to stamp the transaction as a fraud.

In the recent case of *Nailer v. Young*,² the same authority is cited as controlling the case then before the court, where the vendor of a stock of goods attempted to reclaim them by virtue of a recital in the note given for the purchase price, as follows: "A lien is retained on said stock or stocks of goods at Crowder's mill until the purchase money is paid." The proof showed that the goods were sold for the express purpose of being disposed of at retail by the vendee, in his own business, and for his own benefit, and were in part so disposed of.

§ 61. Fraudulent tendency a vicious feature in such transactions. — The opinion in the last named case was delivered by Cooper, J., who had, as Chancellor, previously decided the case of *Phelps v. Murray*,³ in which the principles applicable to this class of cases had been examined with care and minuteness. A stock of goods had in this case been covered by a trust deed, which on its face was designed to include accretions of after-acquired goods, and allowed sales, the profits thereof to be applied to the payment of the secured debt. It was claimed that this conveyance should be decreed valid by a chancery court, because enforceable in equity. The learned judge, however, distinguished the case from those where a contract to mortgage after-acquired property is enforceable in equity, by the cir-

¹ 4 Baxter, 1.

² 7 Lea, 735 (1881).

³ 2 Tenn. Ch. 746.

cumstance that it was an attempt to create a lien on chattels, whose only profitable use is as articles of commerce, and as to which an unlimited power of disposition was reserved. He further explained that such conveyances are not deemed fraudulent by reason of any *presumption* of fraud which is in conflict with the general rule that the intent to defraud is a fact to be proven in every case; but that they are condemned because they are against public policy, in that they throw open "too wide a door for possible fraud;" they are contracts "invalid at law, and not enforceable in equity."

A *dictum* in the recent case of *McCombs v. Guild*,¹ the opinion being by the same judge, shows that the two cases last named, and that of *Bank v. Ebbert*, are considered as together evidencing the rule on this subject in Tennessee. It was there stated further that, in analogy to this doctrine, the court would probably treat a sale of chattels, reserving title to the vendor, but allowing the vendee to sell them as as his own, as "tending to hinder and delay creditors," or as "contrary to public policy and void," in accordance with the New York cases above cited,² and the Connecticut case of *Lewis v. McCabe*.³

MISSISSIPPI.

§ 62. The doctrine advisedly adopted in Mississippi. — In *Harman v. Hoskins*⁴ the Supreme Court of Mississippi follows the ruling in *Robinson v. Elliott* and *Collins v. Myers*, and holds that a conveyance in trust of a stock of goods in trade, with a provision allowing the grantor to carry on his usual business, is fraudulent and void. Like some other courts, this court infers from the vicious character of such an instrument that the parties thereto intend

¹ 9 Lea, 81.

² *Ante*, sect. 42.

³ See *post*, sect. 79.

⁴ 56 Miss. 142 (1878).

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to commit the fraud that results. It is said in this case:¹ "The effect and operation of a written instrument is a question of law, and where the natural and necessary consequence of its provisions is to delay, hinder, or defraud creditors, the court will so declare. The intent is gathered from the instrument, and no external aid is necessary to develop it. A party will be held as 'intending' the natural and inevitable effects of his acts. If his deed necessarily operates to interpose unreasonable hindrance and delay to creditors, or to defeat them altogether, the intent will be a conclusion of law." Though this view of these cases seems based on the idea that a fraudulent intent must always appear, it does not in substance differ from the view that the transaction is actually fraudulent, irrespective of intent. The intent here imputed to the grantor is found alone in the instrument and in the circumstances of the case, not in his motive; and the view of the question above presented is equivalent to saying that the transaction is inherently fraudulent. In the same case, it was further said: "Though the act, in a moral view, was entirely fair, suggested by affection, and though the real purpose was to pay all debts, yet if the conveyance be of the character and operation just described, it will not stand against creditors." That character and operation were furthermore portrayed in these succinct terms:² "If the deed should be valid, the effect would be that White held a shifting lien, which took hold of the goods on hand, and as these were sold off, it separated itself from the effects in the hands of Harman's customers, but at once fastened upon the note or book-account owing by the buyers; and when the merchandise was brought into the store, it at once became impressed with the lien; from the merchandise it passed to the debts of the customers who bought it. And thus, the plan was that the busi-

¹ p. 145.

² p. 147.

ness should revolve in this cycle, the subjects of the lien undergoing mutations from goods to debts, for the space of three years. In the meantime, the other creditors must stand the varying fortunes of the venture, without power or right to move against the goods or the credits of Harman, for White's security attaches to both, as they may be severally acquired." It was observed that not only as to the cash receipts from the business, which were subject to the "control and disposition" of the grantor, but in other respects also, the arrangement would operate greatly to his benefit. For these reasons the trust deed was declared fraudulent as to the creditor who attacked it.

§ 63. Earlier recognitions of the propriety of the rule. — This was the first case in which the question was fully considered by the Supreme Court of Mississippi. Earlier cases had, however, led the way to this decision. In *Farmer's Bank v. Douglas*¹ the question was presented of a reservation, under a mortgage conveying farming property, implements, crops, and furniture, of the right to use property consumable in the use, such as corn, fodder, and potatoes. The same principle was applied here as in *Harman v. Hoskins*, the court saying: ² "The mortgaging of property, the use of which involves its consumption, is an evidence of fraud, not indeed conclusive, but of much weight. Unless it be explained satisfactorily, it must cause the condemnation of the instrument; and it imposes the burthen of proof upon those claiming under such instrument; and when the right to use it is also reserved in the mortgage itself, it is fraudulent upon its face. In this case, one of the debts secured by the mortgage did not become due until twenty-eight months after its execution, and the other until more than four years. The corn, the fodder, the potatoes, and perhaps other articles, would be destroyed in much less

¹ 11 Smed. & M. 469 (1848).

² p. 540.

time. It is thus very manifest that the object was not to apply these things to the payment of the debts, but to secure the debtor in their possession and enjoyment. The reservation in the conveyance, of so much of these articles as was necessary for the support of the property, puts an impress of fraud upon it, from which there is no escape. It was a direct benefit secured to the debtor at the expense of his creditors, which the law does not sanction."

In *Summers v. Roos*¹ a case was presented of a trust deed conveying, among other property, a stock of goods in trade, to secure a debt due in ninety days. The deed was sustained as valid, and the case was distinguished from *Collins v. Myers* and similar cases, by the circumstances that here was no power of sale contained in the deed, and that the trustee had taken possession under the deed before adverse creditors had asserted their claims. It appeared in the deed that the grantor was to retain possession until default, and if he failed to pay at maturity, he was then "to deliver possession of the real estate and of so much of said personal property as may then be on hand." This was not construed as being equivalent to a power of sale. Evidence that the beneficiaries had permitted the grantor to make sales of the goods was held to be only a circumstance to go to the jury. The case, it should be observed, was a suit at law to try the right of property in the goods. But in the case of *Hilliard v. Cagle*,² the same conveyance came again before the court for examination, in a chancery suit brought by creditors of the grantor to set aside the conveyance; and on the whole case as then presented, the deed was declared fraudulent and void as to other creditors. In part, the conduct of one of the beneficiaries under that deed, in inducing others to sell goods to the grantor on credit, influenced the court to its conclusions. But in the careful

¹ 42 Miss. 749; 2 Am. Rep. 653 (1869).

² 46 Miss. 309 (1872).

review by the court of all the facts of the case, it appears that the circumstance of the grantor's continuing to trade with the goods made a decided impression. Among other things, it was said: "The arrangement between Baggett and Summers was antagonistic to the regular and usual course of business, tended to break down commercial confidence and credit, and to entail losses upon those who trusted their goods and property to the retail merchant." The intent of the parties was held immaterial; the court did not think the arrangement was made "with a fraudulent scheme and purpose, to defeat existing or future creditors;" but still considered "the whole scheme fraudulent as to subsequent creditors, as much so as if it had been contrived with that motive and for that object." The decision in Summers *v.* Roos was interpreted as meaning simply that the conveyance was not void upon its face.

§ 64. The doctrine established in Mississippi. — In the recent case of Joseph *v.* Levi,¹ the doctrine of Harman *v.* Hoskins is reaffirmed, briefly and unqualifiedly. The grounds for this opinion as to such conveyances are stated to be, "because of their susceptibility of abuse, by reason of the ease with which they may be employed for wrong purposes, to the injury of creditors." And this is stated as the settled doctrine in Mississippi, in Baldwin *v.* Flash,² where it was held that the claim of the beneficiary to the goods conveyed by a similar instrument might be sustained, on the ground that prior to the intervention of adverse creditors, and by a new, independent act, he had taken, and the grantor had surrendered to him the goods on hand; and as to this, the case was to be submitted to a jury under proper instructions as to the good faith and honest intent of such surrender. This, if free from fraudulent intent, would

¹ 58 Miss. 843 (1881).

² 58 Miss. 593; 59 *Id.* 61.

present only the ordinary occurrence of a preference of one creditor by an embarrassed debtor.

COLORADO.

§ 65. The doctrine well settled in Colorado. — In this State, in the case of *Bank v. Goodrich*,¹ a mortgage on a stock of goods in trade, which allowed the mortgager to “retain possession of the mortgaged property, and use and enjoy the same, until default made,” was held to be fraudulent and void; the rule being regarded by the court as “too well settled to require argument,” though the Illinois and some other cases were referred to as authorities. The evidence furnished by the mortgage itself was supplemented by proof that the mortgagors not only continued in possession of the goods, but carried on their business in its ordinary course, manufacturing and selling goods as usual, to the knowledge of the mortgagee.

OREGON.

§ 66. Oregon adopts the doctrine; registration of instrument immaterial. — In Oregon, the earliest case was *Orton v. Orton*,² which presented the question fairly, the property mortgaged being a stock of goods, the mortgager of which retained possession and the power of sale, and applied the proceeds of sales to his own use with the permission of the mortgagee; but the mortgage was duly filed for record, and it was claimed that the statutes, providing for the registration of such mortgages, removed all presumptions of fraud which could arise in any such case. It was, however, held that this statute did not in any manner apply to the case, but the question still remained to be considered, as to the legal effect of such an agreement, in view of the rights of the mortgager’s creditors. The mort-

¹ 3 Colo. 139 (1876).

² 7 Oregon, 478 (1879).

gage was held fraudulent and void, in accordance with the decisions in *Robinson v. Elliott*¹ and *Collins v. Myers*,² which were recognized as representing "the weight of authority as well as reason."

The question again arose in *Jacobs v. Ervin*,³ in which case the court approved and followed *Orton v. Orton*, saying of the doctrine of that case: "The reasons upon which it is based seem to us to be sound, and the authorities cited in its support are both able and well considered. We have no hesitancy in affirming it here as a sound and authoritative exposition of the law upon the subject in this State." In the later case of *Bremer v. Fleckenstein*,⁴ this was declared to be "settled doctrine" in Oregon. In both these cases, the power of sale was proven by a verbal agreement, additional to the mortgage, which, it was said, "as effectually invalidates the mortgage as an agreement incorporated into the mortgage itself."

WEST VIRGINIA.

§ 67. The reserved power of sale proven by implication in West Virginia. — The few cases of this class presented in West Virginia have all been decided in conformity to this view. *Kuhn v. Mack*⁵ was a case of a trust deed conveying, among other property, a stock of goods, with stipulations referring to sales made by the grantor "in the regular course of his business." The Court of Appeals held this reservation of a power of sale "inconsistent with the object of the trust, and adequate to the defeat thereof;" citing *Lang v. Lee*⁶ and other Virginia cases. The same principle was applied in *Garden v. Bodwing*,⁷ where a similar trust deed, though it contained no express reference to a power of sale or disposition, recited that the grantor

¹ 22 Wall. 513.

³ 9 Ore. 52.

⁶ 3 Rand. 410.

² 16 Ohio, 547.

⁴ 9 *Id.* 266.

⁷ 9 W. Va. 121 (1876).

⁵ 4 W. Va. 186 (1870).

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“agrees and obligates himself to keep always on hand a stock of goods equal in quality, description and value, to the personal property herein above mentioned, until the debt which this deed is drawn to secure, is paid in full.” Deducing from this clause the inference that the grantor thereby retained not only possession, but an absolute power of sale, the court held the deed fraudulent, though there was no other proof of fraudulent intent. And in *Gardner v. Johnston*,¹ where a miller had conveyed all his milling stock and property to secure debts due in about a year and five months, the circumstance that a large portion of the property conveyed was grain, purchased for milling, was taken as conclusive of an understanding that the grantor should use and dispose of the property; and the case was held to call for an application of the rule in *Lang v. Lee* and other similar cases, to wit: that where there are provisions in the deed which will enable the grantor to defeat its expressed object as a security, the deed is fraudulent *per se*. Necessary implication was held as effective, for such a construction, as an express provision in the deed.

THE FEDERAL COURTS.

§ 68. The doctrine enforced in the Circuit and District Courts.—There are numerous cases in the United States Circuit and District Courts, many of which arose in bankruptcy, in which mortgages of this class have been held fraudulent and void, not with reference to the provisions of the bankrupt law, but independently of that or other statutes, and under the general rules of the common law. Decisions to this effect have been given in such cases, in the federal courts of nine different States; and several of these were rendered prior to *Robinson v. Elliott*. In *Smith v. McLean*,² *Re Forbes*,³ and *Re Bloom*,⁴ the power

¹ 9 W. Va. 408.

³ 5 Biss. 510 (Ills.)

² 10 N. B. R. 260 (Miss.).

⁴ 17 N. B. R. 425 (New Jersey).

of sale and disposition appeared upon the face of the instrument. In *McLean v. Bank*,¹ *Bowen v. Clark*,² *Re Kahley*,³ *Re Cantrell*,⁴ *Re Morrill*,⁵ *Re Burrows*,⁶ *Smith v. Ely*,⁷ *Catlin v. Currier*,⁸ and *Re Kirkbride*,⁹ it was shown by evidence *aliunde*. In *Crooks v. Stuart*,¹⁰ there were two mortgages, one of which exhibited such a power upon its face, it being shown as to the other by evidence *aliunde*. It appeared to the court by clear implication from the stipulations of the instrument, in *Re Manly*;¹¹ and, inferentially, in the same manner also in *Re Perrin*.¹² Two late cases in the Supreme Court for the District of Columbia, *Smith v. Kenney*¹³ and *Fox v. Davidson*,¹⁴ dispose of the general question in like manner; though in the first named case, the point was not under decision, the case turning on another question. In *Fox v. Davidson*, the power of sale appeared by clear implication.

In *Re Kirkbride*,¹⁵ a case arising in Missouri, Dillon, C. J., respected and applied the rule adopted in that State as to such conveyances, and held the mortgage in question fraudulent and void as to the goods in trade, though valid as to the fixtures, which were not included in the reservation of a power of sale. In this case the reservation appeared, not on the face of the instrument, but from evidence *aliunde*.

¹ 3 *McLean*, 623 (Ohio, 1845).

² 1 *Biss.* 128; 5 *Am. L. Reg.* 203 (Wis. 1856).

³ 2 *Biss.* 383; 4 *N. B. R.* 124, 378 (Wis.).

⁴ 6 *Ben.* 482 (New York).

⁵ 2 *Saw.* 353; 8 *N. B. R.* 117 (Nevada).

⁶ 7 *Biss.* 526; 5 *C. L. J.* 241 (Indiana).

⁷ 10 *N. B. R.* 553 (New York).

⁸ 1 *Sawyer*, 7 (Oregon).

⁹ 5 *Dillon*, 116 (Mo.).

¹⁰ 2 *McCrary*, 13; 7 *Fed. Rep.* 800 (Iowa, 1881).

¹¹ 2 *Bond*, 261; 3 *N. B. R.* 75, 291 (Ohio).

¹² 7 *N. B. R.* 283 (New York).

¹³ 1 *Mackey*, 12; 9 *Wash. Law Rep.* 69.

¹⁴ 1 *Id.* 102; 9 *Id.* 263.

¹⁵ 5 *Dillon*, 116 (1878).

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Dillon, C. J., stated the Missouri rule as follows: "A conveyance of personal property to secure creditors, when the grantor, by the understanding of the parties, expressed or implied, is to remain in possession of the property, with a power of-sale, is void upon a principle of public policy embodied in the State, irrespective of any question of actual and intended fraud."

§ 69. The fraud illustrated in the opinions of the courts.—In *Re Kahley*,¹ the court said: "A mortgage accompanied by such an agreement or consent is no protection to the mortgagee. Such an arrangement defeats its essential nature and quality as a mortgage, so that it cannot in a legal sense be called a security. It is nothing more than the expression of a confidence by the mortgagee in the mortgager." In *Catlin v. Currier*,² it was said: "The law allows the property pledged to remain in the possession of the mortgager, if the mortgage is put on record as notice to the world. But if the mortgage be also coupled with a condition or agreement that the mortgager may treat the goods as if he were the owner of them, may sell them at his option and receive the proceeds to his own use, such condition or agreement avoids the mortgage. The two cannot stand together. Such use of the mortgaged property by the mortgager is utterly inconsistent with the idea of giving a pledge or security to the mortgagee. In legal effect it is a sham; a nullity; a mere shadow of a mortgage, only calculated to ward off other creditors; a conveyance in trust for the benefit of the person making it, and therefore void as against creditors." "The law assumes absolutely, and, beyond doubt correctly, that in no circumstances can such a transaction be upheld in justice to creditors. That is this case, and whatever may have been the intention of the parties, the law, for the protection of the gen-

¹ 2 Biss. at p. 387 (1870).

² 1 Saw. 12-14 (1870).

eral creditors of the debtor, declares the so-called mortgage void, because made in trust for Daly.” In *Re Burrows*,¹ it was said: “Such an agreement necessarily hinders and delays other creditors;” and in *Re Bloom*,² the court said: “A mortgage embraces a single idea, to wit: the pledge of property as security for the payment of a debt. If it contain other stipulations and provisions, which, in their necessary effect, accomplish other results, and these other results are unlawful, the whole instrument is void. The parties assert that the end and purpose of the mortgage are to enable the mortgager to sell for his own benefit the goods and chattels specifically enumerated, and to make it a lien upon all new goods brought into the store. In other words, it is a device, whereby the mortgager can carry on his ordinary business, with all his property, present and future, fully covered from his other creditors. An instrument operating in this manner necessarily hinders, delays and defrauds creditors.”

§ 70. Other cases in the lower courts; the doctrine recognized. — In *Johnson v. Patterson*,³ Woods, J., while deciding the case adversely, under the provisions of the Georgia statute, gave unqualified recognition to the doctrine of the common law, when unaffected by legislation, in these words: “To one unacquainted with the statute law of this State⁴ this case would present no difficulty whatever. The general rule is, that a chattel mortgage, with possession left in the mortgager, and power of sale, is fraudulent and void.” *Hawkins v. Bank*⁵ and *Overman v. Quick*⁶ in like manner recognize the doctrine as well established; but in each of

¹ 7 Biss. 526.

² 17 N. B. R. 425 (1878).

³ 2 Woods, 443, (Georgia, 1875).

⁴ See reference to this statute, *post*, sect. 111.

⁵ 1 Dillon, 462 (Minn.).

⁶ 8 Biss. 184.

these cases, the mortgagors being allowed to make sales only as agents for the mortgagee who was to control the proceeds, the transaction was held valid. In *Harvey v. Crane*¹ and *Re Eldridge*,² the question, though possibly involved, was not raised or considered. The former of these cases was considered only as to the statutory validity of chattel mortgages, and the latter only as to the matter of after acquired property. In *Bank v. Small*,³ the power of sale appeared by implication, but the question was not considered; and the main question discussed was that of a delay in recording the mortgage, which was considered and decided with reference to the intent of the parties, the court referring afterward to *Mitchell v. Winslow*⁴ as an authority. *Field v. Baker*⁵ in like manner ignores the question which might have been raised upon the record, and the case is considered solely with reference to other questions as to the validity of chattel mortgages.

In *Johnson v. Patterson*,⁶ it will be observed that the rule under the Georgia statute, which is recognized and applied in the decision, is taken as a rule of property, which should be locally binding upon the federal courts. The same idea evidently controlled the decision in *Re Kirkbride*.⁷ *Per contra*, in *Crooks v. Stuart*,⁸ the doctrine of *Robinson v. Elliott* was held conclusive upon the court, for the reason that no Iowa statute made any contrary provision; and the well settled doctrine of the Iowa courts on this subject was disregarded, McCrary, C. J., saying: "This is a doctrine of general jurisprudence, not depending for its support upon any provision of State law; and we are, therefore, bound by the decision of the Supreme Court of the United States."

¹ 2 Biss. 496; 5 N. B. R. 218 (Ill.).

⁵ 12 Blatch. 438.

² 2 Biss. 362 (Wis.).

⁶ 2 Woods, 443.

³ 7 Fed. Rep. 837 (Me. 1881).

⁷ 5 Dillon, 116.

⁴ 2 Story, 630.

⁸ 7 Fed. Rep. 800; 2 McCrary, 13.

§ 71. **An earlier decision by the Supreme Court.**—This principle of law was not wholly devoid of support in the expressed views of the Supreme Court, even before *Robinson v. Elliott*, though it was in that case considered and discussed as a new proposition in that forum. The question arose incidentally in *Bank of Leavenworth v. Hunt*.¹ In that case it appeared by evidence outside the mortgage that the mortgagors of a stock of goods in trade remained in possession and continued to sell the goods, with the assent of the mortgagee, until a certain time, when the balance remaining was transferred to the mortgagee under the mortgage. The question at issue was, whether this transfer, being made in view of and just prior to the bankruptcy of the mortgager, was valid and effectual under the bankrupt law. The Supreme Court declined to assume it to be so in the face of the testimony, which showed it to be invalid in several respects; one of which was that, if the facts had been found by the jury which the testimony tended to establish, as to the power of sale, the mortgage would have been fraudulent and void as against creditors, under the common-law rule announced in *Wood v. Lowry*.²

The recent case of *Wood v. Weimar*,³ which arose in Michigan, may be here noticed, though merely because it exhibits an entire disregard of the question. It presented a mortgage on a stock of goods, under which the mortgager was suffered to continue business and to sell goods as usual, and creditors attached the remaining goods before the maturity of the preferred debt, complaining as to the statement made of the amount thereof. The case was heard in the Supreme Court on the errors assigned, and neither by the counsel or the court was the question of the reserved power of sale presented, discussed, or considered. Apparently this question was treated by counsel as one not fairly arising in a Michigan case.⁴

¹ 11 Wall. 891 (1870).

² 17 Wend. 492.

³ 104 U. S. 786.

⁴ See the Michigan law on this subject stated, *post*, sects. 88, 89.

§ 72. Antagonistic cases in the United States courts. — In addition to *Brett v. Carter*,¹ there are in the reported decisions of the United States Circuit Courts, two cases which hold the same view of the law, and another in which that view is very strongly favored although not expressly adopted. The case last referred to is *Miller v. Jones*,² in which Associate Justice Strong heard on appeal a controversy involving a mortgage on a stock of goods. The only point decided, with reference to the question of a power of sale, is one of practice. The trial court had thought the implication of a power of sale so strong upon the face of the mortgage, that the case would fall within *Robinson v. Elliott*, and he accordingly directed a verdict adverse to the conveyance. This was, on the appeal, held erroneous. The case was distinguished from *Robinson v. Elliott*, by the circumstance that no power of sale was given in the instrument, but that its recitals expressed by implication a denial of any such power. Though the proof showed that such power had been exercised, it was nevertheless erroneous to direct a verdict. The existence or non-existence of an agreement or understanding to allow sales is a fact to be found by the jury, under proper instructions. In reversing the decision of the District Court on this ground, Mr. Justice Strong referred to the diversity of opinion on the main question concerning the reservation of a power of sale under such mortgages; and while he did not in any manner dissent from the conclusions reached in *Robinson v. Elliott*, he spoke with apparent approval of the contrary authorities in Maine, Massachusetts, Iowa, and Michigan, and said: “ It has in many cases been decided that a mortgage of chattels which permits the mortgagor to remain in possession, and to dispose of the goods in the ordinary course of his business, is not of course

¹ 2 Low. 458.

² 15 N. B. R. 150 (New Jersey, 1876).

fraudulent as a matter of law.' In *Re Bloom*,¹ Nixon, J., distinguished this case materially from *Robinson v. Elliott*.

*Barron v. Morris*² was an appeal from the District Court in Texas, heard by Mr. Justice Bradley in the Circuit Court, involving a trust deed on carriages and harness, which were used partly as a stock in trade. The case had been tried by the district judge without a jury, and it appeared in evidence that sales had been made by the grantor in the conveyance with the knowledge and assent of the beneficiary, the proceeds being sometimes, but not always, applied to the secured indebtedness. The report of the case is meager and unsatisfactory upon this point, and the disposition made of the proceeds of sales does not fully appear. The opinion of Mr. Justice Bradley is devoted mainly to questions of practice, all that is said on the question of the trust deed and the power of sale being that "the fact that the bankrupt disposed of the property as his own did not vitiate the deed as to the other creditors, but was a matter that affected no one but Brush (the secured creditor), and that the latter was not bound to apply the proceeds of the sales of the encumbered property to the secured debt."

§ 73. *Mitchell v. Winslow* examined. — The great name of Mr. Justice Story has made the case of *Mitchell v. Winslow*³ a leading and influential authority in support of the supposed validity of this class of conveyances. It will be seen, however, upon examination of this case, that the precise question was not carefully considered according to the habit of this learned judge. The transaction presented was a mortgage deed upon a manufacturing establishment, covering not only tools and machinery, but stock in trade; the debt secured to mature in four years, and the grantors "to

¹ 17 N. B. R. 425.

² 14 N. B. R. 371 (1876).

³ 2 Story, 630 (Maine, 1843).

hold and enjoy all and singular the premises hereby granted, and to secure and take the rents and profits therefor, to and for their own use and benefit." The grantors continued their business in the usual way for two and one-half years, when they became bankrupt; and the suit was brought by their assignee to recover property remaining on hand from the mortgagee who had taken possession of it. For the assignee, it was argued that the reserved power and dominion over the mortgaged property, with the right to sell for their own use, reserved by the mortgagors, was inconsistent with the nature and objects of such a mortgage, and made the transaction invalid, as against the policy of the law. The learned judge conceded that the reserved power of sale was fairly deducible from the language of the instrument, but thought this not inconsistent with the validity of the mortgage. Said he: "I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence." In his view, the material questions to be considered were, the registration of the mortgage, the possession retained by the mortgager, and the mortgagee's lien on the newly acquired or manufactured goods by substitution. The mere retention of possession by the mortgager was not fraudulent *per se*, and registration operated as constructive and sufficient notice to creditors. The question of the reserved power of sale was treated as a question of the efficacy of a lien by substitution. As authorities in support of the validity of such conveyances, the cases of *Abbott v. Goodwin*¹ and *Macomber v. Parker*² were cited. Each of these cases, however, has features of marked distinction from *Mitchell v. Winslow*. In *Abbott v. Goodwin*, where there was a conveyance of a stock of goods, the sales were to be made

¹ 20 Maine, 408 (1841).

² 14 Pick. 497 (1833).

by the grantor solely as agent of the grantees, who secured to themselves the control of the entire proceeds of sales ; and the goods in dispute had been purchased with those proceeds, " through his agency, under their authority ; " so the element of the grantor's control of the sales, or of the proceeds thereof, for his own use, or at his own discretion, did not exist in the case. *Macomber v. Parker* presented a case of the manufacture of bricks, in the brickyard of H. & L., by E. as their agent and joint-contractor ; the manufactured bricks to be divided, H. & L. retaining a lien on E.'s share thereof until payment of their advances. This arrangement being attacked by a creditor of E. as fraudulent, was sustained by the court on the theory of " an agreement for the pledging of the bricks as they should be made." No element existed in the case of a discretionary power of sale by E. He had been allowed to sell only as agent for H. & L. These cases, together with an English case cited by Mr. Justice Story, presented only this question of equitable lien by substitution, without any feature of a reserved power of sale, such as the learned court recognized in *Mitchell v. Winslow*. While, therefore, the decision in this case, like that in *Barron v. Morris*, is distinctly in favor of the validity of such a conveyance, it seems to have been given without full consideration of the real difficulties inherent in such transactions, and in deference to the supposed authority of cases which are, in fact, irrelevant.

INDIANA.

§ 74. The state of the law in Indiana prior to *Robinson v. Elliott*. — It is fortunate, in some respects, that when the Supreme Court of the United States was again called on to examine and pass upon this question in *Robinson v. Elliott*, the case before it was one originating in Indiana ; for in that State the law upon the subject of fraudulent intent was in so peculiar a condition as to necessitate a close

analysis of the precise province of the court in dealing with the subject. *Jordan v. Turner*¹ held a mortgage of cattle and horses fraudulent where the grantor had retained possession, and traded and trafficked with the stock, much after the manner of Twyne's Case. The possession of the grantor was here held to be conclusively fraudulent as a matter of law. But in the case of *Watson v. Williams*,² which presented a question of possession merely, and where there was "no evidence that the mortgager used, traded on, or treated the mortgaged goods as his own," the rule was deduced from all the English and American decisions that fraud, in all cases of mere possession, was a question of fact for the jury. The same rule was applied in the succeeding case of *Hankins v. Ingols*,³ and it remains the doctrine of Indiana on the question of possession alone. The distinguishing feature of *Jordan v. Turner* was the power of sale. In that case, the same judge who soon after pronounced the opinion in *Watson v. Williams*, said: "The mortgager not only kept possession of the goods, but he also used and treated them as his own; converted them to his own use; traded and trafficked on them as his own; sold them as his own, and converted the proceeds to his own use. These proceedings are not only contrary to the face of the mortgage, but are inconsistent with, and in direct opposition to the intention, spirit and meaning of it, and render it wholly fraudulent and void as to creditors."

*New Albany Ins. Co. v. Wilcoxson*⁴ had gone far toward approving the doctrine of the New York, Wisconsin, Ohio, and Minnesota cases. It sustained the finding of the lower court, that a provision in a mortgage upon a stock of goods in a manufacturing establishment, allowing the grantor to continue his business, was necessarily fraudulent and void as against creditors, and cited the advanced case of Free-

¹ 3 Blackf. 309 (1833).

³ 4 *Id.* 35.

² 4 *Id.* 26; 28 Am. Dec. 36.

⁴ 21 Ind. 355 (1863).

man *v.* Rawson.¹ This was done rather argumentatively than decisively, with expressions of doubt as to how far the principles of that case would reach; but still declining to disturb the finding made by the lower court without a jury. But, on the other hand was the similarly indecisive case of *Maple v. Burnside*.² The Legislature had engrafted upon the statutes of Indiana the provision, adopted in several other States, that the question of fraudulent intent should in all cases be deemed a question of fact. The jury in *Maple v. Burnside* had been told that if the mortgager "remained in possession of the mortgaged property, using and trading with it as the owner, it is a fraud and you must find for the plaintiffs;" and the appellate court reversed the judgment, on the grounds, first, that the instruction was calculated to confuse the jury, and second, that it disregarded the statute as to fraudulent intent. Thus stood the law in Indiana when *Robinson v. Elliott* arose; and counsel in that case, seeking to uphold the mortgage, cited and relied on *Maple v. Burnside*. It was thus an important consideration before the Supreme Court of the United States whether all questions of fraud in law were not pretermitted by the statute, so far at least as concerned Indiana cases. It was urged that "constructive fraud" ceased to have any existence in Indiana, and that the courts had no right to entertain or express any opinion whatever upon the question of the fraudulent character of a conveyance which reserved upon its face the right to continue selling the goods in trade as theretofore. But the Supreme Court held that the statute in question could have no reference to the power or duty of courts to pass upon questions of law. The Indiana case was cited of *Jenners v. Doe*,³ a case referring to lands, where it was considered that the statute in question was merely declaratory of the law, and that the question of

¹ 5 Ohio St. 1.

² 22 Ind. 139 (1864).

³ 9 Ind. 461.

fraudulent intent, which it referred to the jury, was only the *fact of such intent* in cases hinging upon the actual intent of the parties. It was well said in that case: “If the court determines that the legal effect of the instrument is to delay creditors, the instrument is rejected. There is no occasion to go into the question of intent, for that could not aid a void instrument. Intent will not control the plain legal effect of the terms of an instrument; and if that effect would be to delay creditors, any intent that the party might have had to the contrary would not help the matter.” The United States Supreme Court takes the same view, and, recognizing its duty to declare the law in all cases of fraud, supplements the foregoing views with a clear illustration of that feature of fraudulent tendency in the transaction, and of that conduct to which the law conclusively imputes a fraudulent effect, which are totally independent of any of the intentions of the actors.

The same distinction had been early taken in New York, in *Goodrich v. Downs*¹ and *Cunningham v. Freeborn*,² viz: that the question of fraudulent intent to be left to a jury was a wholly different question from that of fraud in law, which the courts are impelled to declare existing in any conveyance which reserves a benefit to the assignor.³

§ 75. The doctrine of *Robinson v. Elliott* adopted in Indiana. — This decision of the highest court in America has not been without influence even in Indiana. The question has been again presented there, in *Mobley v. Letts*.⁴ Perhaps it was impossible that the issues could be more sharply presented, with a view of eliciting a conclusive adjudication of the question, in respect to not only

¹ 6 Hill, 438.

² 11 Wend. 240.

³ See a further consideration of this question, *post*, sect. 151.

⁴ 61 Ind. 11 (1878).

the Indiana statute before referred to, but the common law doctrine also. In the Circuit Court, a jury had found a general verdict in favor of the mortgagee, and against his antagonists who were execution creditors of the mortgager; and had also found by a special verdict, at the instance of the mortgagee, that there was in the transaction no fraudulent intent. But at the instance of the execution creditors, the jury had also found, by special verdict, an understanding between the parties that the mortgager was to continue in possession of the stock of goods with the right to continue business and to make sales as usual; though they found also that the mortgagee did not consent to have the proceeds of sales applied to the payment of any debt besides his own. The Circuit Court, declining to give judgment for the execution creditors on the special verdict they relied on, gave judgment for the mortgagee on the general verdict in his favor. Thus it was imperative upon the appellate court to determine whether the statute as to fraudulent intent controlled the case, and also whether the question of intent was at all involved. Nor did the court hesitate, as in *New Albany Ins. Co. v. Wilcoxson*, to decide the case upon principle. The stipulation in the mortgage, which allowed the mortgager "the privilege of using" the stock of goods, was held to imply necessarily "the sale thereof by him in the ordinary course of his business," and nothing else. The proposition advanced argumentatively in *New Albany Ins. Co. v. Wilcoxson*, that "if a mortgage is executed merely as a cloak to protect property in the hands of a mortgager from creditors other than the mortgagee, the mortgager still retaining possession, and the right of disposition, and these facts appearing upon the face of the instrument, they would, as a legal proposition, vitiate it, and a court should so declare," was adopted as the law of the case; and this, and the further proposition that "if, as in this case, the mortgage does not contain any stipulation or covenant, on

the part of the mortgager, that he will apply the proceeds of the sales of the mortgaged stock, so used by him, to the payment of the mortgage debt, or the debt of any other creditor, in our opinion, such mortgage is, and ought to be declared to be, void on its face, as against the other creditors of the mortgager," were announced as the law of Indiana. *Robinson v. Elliott* was cited with express approval. Thus early was realized the confident expectation of Mr. Justice Davis, expressed in the latter case,¹ that when a similar case should again arise in the Supreme Court of Indiana, "it would be decided in accordance with the views we have presented."

This decision was advisedly adhered to in *Davenport v. Foulke*,² in which case, again, no difficulty was experienced in construing the retained possession and use of the stock of goods, under the circumstances of the case, as necessarily implying a power of sale, which would be "the only reasonable use the mortgager could make of it." Mr. Herman's condensed statement of the doctrine was cited with approval: "It is not the simple fact of possession by a mortgager that will avoid the mortgage, but it is the possession with the power of sale which defeats the instrument."³

The same rule will not apply, however, if the stipulation be that the proceeds of sales, after paying expenses, are to be paid to the mortgagees; this arrangement will be sustained unless shown by extrinsic facts to be otherwise objectionable.⁴

§ 76. Doubtful cases in Indiana. — In *Morris v. Stern*,⁵ where the mortgage had no stipulation on the subject, an

¹ 22 Wall. at p. 526.

² 68 Ind. 382; 34 Am. Rep. 265 (1879).

³ Herman on Chat. Morts. 236.

⁴ *McLaughlin v. Ward*, 77 Ind. 383; *Lockwood v. Harding*, 79 Ind. 129.

⁵ 80 Ind. 227.

allegation by the administrator of the mortgager that the mortgager was allowed to retain and sell the goods, was held to be no defence to the mortgagee's action for a foreclosure of the mortgage, unless intentional fraud were proven. The cases of *Mobley v. Letts* and *Lockwood v. Harding* were cited as authorities in this case, upon the question of fraud; but it is difficult to see their pertinence, in view of the general principle that all conveyances, though fraudulent as to third persons, are good between the parties. It may have been this citation which subsequently led the "Supreme Court Commissioners" of Indiana to decide *McFadden v. Hopkins*¹ without reference to either *Mobley v. Letts* or *Davenport v. Foulke*. The case was a controversy between two successive mortgagees of the same stock of goods, each of whom had allowed the mortgager to control and sell the goods. The junior mortgagees having purchased of the mortgager a portion of the mortgaged goods, were sued for their value by the senior mortgagee, who recovered judgment against them therefor. The case was disposed of on the ground that the prior mortgage was valid as against a sale by the mortgager, unless intentional fraud were proved. If the principle of *Mobley v. Letts* and *Davenport v. Foulke* had been applied to the senior mortgagee alone, he would have failed in his action because of the fraud in his own transaction; and if it were applied to both mortgages, alike, as it might properly have been, the case might have been dismissed without judgment, both parties being *in pari delicto*. How far the failure to apply that principle renders this case of *McFadden v. Hopkins* a disturbing element in the jurisprudence of Indiana will depend on the extent to which the decisions of the "Commissioners," when adopted by the Supreme Court, are considered as authority.

The later case of *Louthain v. Miller*² suggests further

¹ 81 Ind. 459 (1882).

² 85 Ind. 161.

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doubts as to the present position of the Supreme Court of this State upon the question. As in *Mobley v. Letts*, while the mortgagee had a general verdict in his favor, his adversaries had a special verdict finding the fact of an agreed power of sale. The court, while reversing the judgment on another and different ground, declined to declare the transaction fraudulent by reason of the reserved power of sale, and said that the question of fraud in this case was one of fact for the jury, not one of law to be decided by the court. *Mobley v. Letts* was overlooked, and no kindred case was referred to; the authorities cited being *Morris v. Stern*, *McLaughlin v. Ward*, *Lockwood v. Harding*, and *Rose v. Colter*;¹ in which last named case a reserved power of sale was not involved.

¹ 76 Ind. 590.

CHAPTER IV.

THE MAJORITY DOCTRINE FAVORED.

SECTION 77. Reserved power of sale recognized in Pennsylvania as a vicious feature.

78. Fraud not resting in intent, distinguished.
79. Reserved power of sale recognized in Connecticut as a vicious feature.
80. Fraudulent tendency a fatal feature of such conveyances.
81. The North Carolina view of fraud in conveyances; a legal question purely, but resting on intent.
82. Confusion resulting from supposed distinction between fraud in law and actual fraud.
83. Attempt to solve the difficulty by treating fraud in conveyances as a question of procedure.
84. Renewed difficulty in cases involving a reserved power of sale.
85. The doctrine in question enforced as a rule of presumptive evidence.
86. Arkansas approves the doctrine unqualifiedly.
87. Nebraska adopts the doctrine with limitations.

PENNSYLVANIA.

§ 77. **Reserved power of sale recognized as a vicious feature.**—Pennsylvania is one of those States which adheres to the rule, early adopted, that retention of possession by the grantor in a sale or mortgage of chattels is fraudulent *per se*.¹ Possession is in this State deemed to be the matter of principal consideration in this class of cases. This feature of her jurisprudence allows her courts but little opportunity for considering the precise question now under discussion. But the cases which involve the

¹ Carpenter v. Mayer, 5 Watts, 483 (1830); Garman v. Cooper, 72 Penn. St. 32 (1872).

element of a power of disposition of the goods are in accord with those from other States already referred to. In *Welsh v. Bekey*,¹ a mortgage of crops, under which the mortgager was to retain possession and make sales, the mortgagee to have nothing but the proceeds of the sales, was held fraudulent. It was stipulated in the instrument that “*Hayden shall take care of the crop while growing, cut, thresh and carry it away, under the direction and control of Welsh, who is to have his money out of the price of it.*” The court said: “*Taking care of grain, growing, reaping, threshing and selling it, include all the notorious acts of ownership that are ordinarily exercised in relation to this species of property; while the act of giving directions is a matter usually known only to the parties.*” So, notwithstanding the “*admitted purity of their intentions,*” this transaction between the parties was declared fraudulent as to creditors, upon the authority of *Ryall v. Rolle*,² on the subject of retaining possession with power of disposition of the goods.

In *Clow v. Woods*,³ a somewhat similar case, involving a tannery and the tanning business, including hides in vats, the possession of the mortgager was held fraudulent under the authority of the English cases. Gibson, C. J., did not object to the transaction “*altogether on the ground of the possession not having been immediately delivered,*” and thought, if this were the only question, “*a good reason might be assigned for the mortgager continuing in possession as the agent of the mortgagee.*” But the difficulty in the case was that after a general conveyance, without a schedule, the grantor continued in possession, and went on with the tanning business as before, so that he “*might have continued to carry on business, and to purchase hides, bark and tools as usual; and whether he should be able to shelter*

¹ 1 Penn. 57 (1829).

² 1 Wilson, 260.

³ 5 Serg. & R. 275; 9 Am. Dec. 846 (1819).

such property under the mortgage, would depend on the secrecy and adroitness with which the matter was managed.” The learned judge added, as to the inherent fraud in the transaction: “ I do not suppose the parties had, in fact, a fraudulent view ; but as such a transaction might be turned to a dishonest use, it was their duty, as far as in their power, to secure the public against it.”

*Hower v. Geesaman*¹ and *Bentz v. Rockey*² are the most satisfactory authorities upon the immediate question.

In the first named case, the assignor, under a general assignment for the benefit of creditors, carried on as usual his business as a tavern-keeper, and also his business as a hatter. The transaction was held fraudulent in law and void, the question devolving upon the court to settle as one of law purely. It was not alone the omission of a schedule, nor the preferences given, nor the limitation of time, nor the mere retention of possession, which dictated the judgment. The court said: “ We are all of opinion that the deed of assignment was null and void as against creditors, and fraudulent in law. The deed is absolute upon its face ; the grantor retained possession ; he held and used the property as before ; he sold and disposed of it as his own.”

So in *Bentz v. Rockey*, where it appeared to be a part of the contract of sale of a tannery and fixtures, that the vendor, who remained in possession, was to have a part of the property used in the tanner’s business as compensation for “ working out the stock,” this was held such a reservation to his own use as constituted fraud in law and avoided the transaction. The established Pennsylvania rule was referred to, that a want of delivery of possession would render the transaction fraudulent ; but outside of this point, the court said that “ the sale, whether fraudulent in fact or not, was clearly fraudulent in law, because a portion of the property

¹ 17 Serg. & R. 251 (1828).

² 69 Penn. St. 71 (1871).

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embraced in the bill of sale was secretly reserved for the use and advantage of Roller.”

§ 78. Fraud not resting in intent, distinguished.—Throughout the Pennsylvania decisions upon the subject of conveyances in fraud of creditors, the distinction is taken and carefully preserved, between fraud proven by a fraudulent intent, and fraud not resting in intent. In *Wilt v. Franklin*,¹ the distinction was thus stated by Tilghman, C. J.: “Although the statute 13 Eliz. is bottomed on the supposition of an immoral intention, yet it has been judged necessary to determine that certain circumstances, which in their nature *tend* to deceive and injure creditors, shall be considered as sufficient evidence of fraud.” In numerous cases, it is declared that the rule as to mere retention of possession, above referred to, is a rule of law for the courts to act on, and which cannot properly be submitted to a jury; the fraud in such cases is a sort of constructive fraud, or fraud in law.² The inferior courts are sometimes criticised for failing to observe this distinction. Fraudulent intent is in certain cases the vital question to be submitted to a jury; but when the facts are found, whether they establish fraud resting in intent, or fraud of some other kind, it is for the court to render judgment as to the fraud. The case of *McKibbin v. Martin*³ exhibits the very pronounced views of the Supreme Court of this State upon this question. It is with manifest reluctance that a transfer of a hotel business under doubtful and suspicious circumstances is there allowed to stand, after a verdict of the jury that there was an actual and sufficient change and delivery of possession to the grantee; but this verdict is taken as

¹ 1 Binn. 502; 2 Am. Dec. 474 (1809).

² See *Worman v. Kramer*, 78 Penn. St. 378; *Craver v. Miller*, 65 Id. 456; *Shattuck v. Haworth*, 91 Id. 449; *Boud v. Bronson*, 80 Id. 360.

³ 64 Penn. St. 352; 3 Am. Rep. 588.

removing the case out of the category of those where possession was retained by the vendor. The occasion was deemed opportune for a full and explicit statement of the distinction observed in this State. *Clow v. Woods* was declared to be the Magna Charta of Pennsylvania law on the subject; and after defining actual fraud as being identical with fraud resting in the intent of the parties, the court gave this definition of legal or imputable fraud: "Fraud in law consists in acts which, though not fraudulently intended, yet as their tendency is to defraud creditors, if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, are full evidence of fraud, and are fraudulent in themselves, the policy of the law making the acts illegal." This statement of the rules of law was approved in *Evans v. Scott*.¹ In the light of this distinction, the cases of *Clow v. Woods*, *Hower v. Geesaman*, and *Bentz v. Rockey* may be more clearly understood, in reference to their adjudications of fraud as conclusively shown by the retention of the goods with discretionary power of disposition, and entirely irrespective of all questions of intent.

The Pennsylvania cases cited not only show that the doctrine of *Robinson v. Elliott*, *Collins v. Myers* and kindred cases meets with favor in this State, but they indicate further that even if the doctrine of fraud as resulting from possession alone were to be abandoned, the courts would adhere to the view that possession accompanied by a discretionary power of disposition must be considered fraudulent *per se*.

CONNECTICUT.

§ 79. **Reserved power of sale recognized as a vicious feature.** — The Supreme Court of Errors of Connecticut reached a similar conclusion in *Bishop v. Warner*,² but with-

¹ 89 Penn. St. 136 (1879).

² 19 Conn. 460 (1849).

out giving similar reasons for its judgment. Mortgages had been given upon the stock in trade of a carriage manufactory; there was a formal delivery of possession to the mortgagees, after which the mortgagors continued business with the goods as usual. The court found that that "up to the time of the attachment, the mortgagors were carrying on an extensive manufacturing business with the mortgaged property; supplying their customers from day to day; selling the carriages as they were finished, and as they were able to find purchasers;" "generally, we are aware, professing to act as agents for those in whom it was claimed, for the time being, was the paper title to the property; but yet, in fact, acting without accountability to any one; paying their debts to other creditors with the mortgaged property, as if they were the undisputed owners." The vivid picture thus afforded of the necessary results of the transaction satisfied this intelligent court of the vice inherent in it, without the necessity of reference to cases adjudicated elsewhere. The principle announced by the court as the ostensible basis of its decision, was simply that the possession of the mortgagees was colorable and not real; and it is intimated that the parties must have intended, because they must have known, the fraudulent consequences of their transaction. It is plain that the court felt and appreciated the necessary effect and tendency of the transaction, as in itself sufficient to make it fraudulent; but the case was treated as turning on intent, doubtless in deference to the traditional practice of testing all such cases by the statute of 13 Eliz. This court has, however, clearly seen that actual fraud need not always rest on intent. It had already been announced in *Pettibone v. Stevens*¹ and *Beers v. Botsford*,² as the doctrine in this State, that when the facts of a case are ascertained, fraud then becomes a question of law from

¹ 15 Conn. 19; 38 Am. Dec. 57.

² 13 *Id.* 146.

those facts ; “ *it is the judgment of the law on facts and intents* ;” a principle which has since been of frequent application in the adjudications upon fraud, in Connecticut. It had also been previously held,¹ as the law of this State, that mere retention of possession by the grantor in a sale or conveyance of chattels furnishes only presumptive, not conclusive, evidence of fraud ; for which doctrine the English cases of *Latimer v. Batson*² and *Martindale v. Booth*³ were cited ; and in *De Forest v. Bacon*,⁴ where the assignees for preferred creditors under a general assignment were to take the manufactory and raw materials on hand, and themselves conduct the business until those materials were worked up, it was held that this was not fraudulent *per se*, but that the question of fraud was to be determined by the intent of the parties.

A more clear expression of the views of this court on the particular subject was given in the recent case of *Lewis v. McCabe*.⁵ The immediate question was whether a conditional sale of goods, reserving title in the vendor until payment of the price, should be sustained as valid ; which was decided in the affirmative. But the goods in this case were liquors, which the vendee placed in his stock in trade, it being expected and understood that he should sell the same in the course of his business ; and this was recognized as a distinguishing feature of the case. It was therefore considered material to inquire whether the arrangement contemplated sales by the vendee as of his own goods, or sales as agent for the vendor which should transfer his reserved title. The latter construction was adopted by the court, in view of the facts of the case. A contrary construction would

¹ *Meade v. Smith*, 16 Conn. 346 ; *Calkins v. Lockwood*, *Id.* 276 ; 41 Am. Dec. 143.

² 4 B. & C. 652.

³ 3 B. & Adol. 498.

⁴ 2 Conn. 633.

⁵ 49 Conn. 141 ; 21 Am. Law Reg. 217 (1881).

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have led to a different result. It was conceded that there was much force in the doctrine that possession, with the *jus disponendi*, renders such transactions fraudulent, "without regard to the real intent of the parties;" and it was said, "If, however, the contract in question must be construed to mean that the plaintiff authorized McAvoy to sell the property as his own, we should be constrained to hold it so absolutely inconsistent with the retention of title in the plaintiff, as to waive or make void the condition."¹

§ 80. **Fraudulent tendency a fatal feature.**—The principle of the case of *Bishop v. Warner* was involved in *Pettibone v. Stevens*,² where the failing debtor, instead of retaining possession and power of sale of his stock of goods, took a note from a third party, the payments on which he was to use for the support of himself and family, giving to the same third party his own note for an equal sum, which was to be secured by the conveyance of the goods. This, as a reservation to the use of the debtor, was condemned. The court said the question was "whether the transaction is not one of the kind *calculated* to hinder, delay and defraud creditors," and ruled on it accordingly as a question of law, adding, "we have no hesitation in saying that, if tolerated, it would become *an inlet to fraud*, and lead to all imaginable abuse."³ These citations show that fraudulent tendency is plainly recognized in Connecticut as sufficient to invalidate such conveyances.⁴

NORTH CAROLINA.

§ 81. **The North Carolina view of fraud in conveyances—A legal question purely, but resting on intent.**—Among the States which are now to be recognized as ap-

¹ For New York cases to the same effect, see *ante*, sect. 42.

² 15 Conn. 19.

³ p. 26.

⁴ See a similar case in Tennessee, cited sect. 59.

proving this rule of law, is North Carolina. The decisions in this State, in the first cases presented which involved a conveyance of a stock of goods in trade, with power of disposition, are somewhat peculiar; but their divergence from the general authorities on the subject pertains to procedure rather than to substantive law. This will appear from an examination of the current of earlier adjudications in this State on the subject of fraudulent conveyances in general. On questions of fraud, the Supreme Court of this State had already made some peculiar distinctions, which related mainly to procedure, as they have been interpreted in the later decisions.

It was well established that reservations of whatever kind, to the use of the grantor, would in North Carolina serve to invalidate a conveyance; such as a parol agreement for redemption;¹ an agreement that part of the property be transferred to the debtor's wife and children;² an agreement to keep the transaction secret for a time;³ or a preference given to such creditors as will release in full.⁴

On the question of possession alone, under conveyances of property, it was settled, after some discussion, that this circumstance furnished only presumptive evidence of fraud, which might be rebutted.⁵

In two cases, Ruffin, C. J., for the Supreme Court, had carefully explained and illustrated the respective provinces of court and jury in cases involving fraud in conveyances, in which it was clearly shown that all such cases present the elements of both law and fact. In *Leadman v. Harris*,⁶ where it was claimed that the entire secret purpose of a

¹ *Gregory v. Perkins*, 4 Dev. Law, 50 (1833).

² *Kissam v. Edmundson*, 1 Ired. Eq. 180 (1840).

³ *Hafner v. Irwin*, 1 Ired. Law, 490 (1841).

⁴ *Palmer v. Giles*, 5 Jones Eq. 75 (1859).

⁵ *Cox v. Jackson*, 1 Hay. 423 (1796); *Ingles v. Donalson*, 2 Hay. 57 (1798); *Trotter v. Howard*, 1 Hawks, 320 (1821); *Rea v. Alexander*, 5 Ired. Law, 644 (1845).

⁶ 3 Dev. Law, 144 (1831).

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conveyance was to secure the property conveyed to the benefit of the debtor, and the case thus presented the question of fraudulent intent, the learned judge said: “I do not question the power, nor the sole power, of the jury, to find the intent, when it is to be made to appear by matter extrinsic of the deed. But what intent is in law fraudulent, the court must inform the jury; *else the law can have no rule upon the doctrine of fraud, and every case must create its own law.*” And again, “If, therefore, as is mentioned in Twyne’s Case, a conveyance be taken for a true debt, upon the understanding that the debtor is to have the use of the property, that although it is apparently conveyed in satisfaction or security for it, *yet the beneficial ownership is to be with the debtor*, it is void. Why? Because it is taken, that in truth, it was not taken for the very purpose of satisfying the debt, but under the cover thereof, for the ease and favor of the debtor, either generally or for some definite time. What temptations would it not hold out to dishonest men to run up scores, without the smallest intention of making payment, if, by finding a friend amongst their creditors, they could enjoy their property all their lives against the other creditors?” So it was held that the trial court should have plainly told the jury that the imputed intent in this case would have rendered the conveyance void, leaving them simply to find the facts as to such intent.

And in *Gregory v. Perkins*,¹ where the trial court had refused to instruct the jury that a secret agreement for redemption would render void a conveyance absolute on its face, and had “ruled that the question of fraud was for the jury alone,” the appellate court conceived that its decisions on the question of possession alone, as evidence of fraud, had been misunderstood; and Ruffin, C. J., further explained the law of all such cases as follows: ² “Fraud is matter of law. It is stated in the books to be a conclusion

¹ 4 Dev. Law, 50.

² p. 53.

of law upon facts and intents found or admitted. The word is expressive of a legal idea, and admits of a legal definition; and, therefore, is correctly stated, as a general proposition, to be matter of law. When an act or intent is stated, it is the province of the court to pronounce whether that is injurious and covinous. But as persons perpetrating frauds seldom express them explicitly, but generally conceal them under the appearance of fairness, it is often—indeed seldom otherwise—difficult to ascertain the real purpose of the transaction. It is then the province of the jury to find the actual intent. In that sense, fraud is called a mixed question of law and fact. But it is never exclusively one of fact, as was supposed in this case; nor do the cases in this court, alluded to, support such an idea, when properly understood.” And after stating the rule in North Carolina, on the subject of possession alone, to be, that the jury find simply the fact as to the intent of the possession, whether to give a false credit, or otherwise, he continued: “It is not held, that the jury shall give to those intents, or to a delusive credit, such effect as to them may in each case seem proper. That the law declares; and the security of the creditors depends upon the fixed principles of the law, and not on the uncertain judgment of jurors as to what is covin. If a debtor convey his property without consideration and in trust for himself, it is fraudulent; and if that appear in the conveyance, the court adjudges it to be void; for the party cannot show the deed under which he claims title, without also showing the intent. If it be not so expressed, but be secretly reserved, then its existence must be found by the jury. Then the same consequence, as a legal consequence, follows from the fact thus found by the jury, as from the same fact as admitted by the party.” These views are again industriously reaffirmed, with further explanations, in *Foster v. Woodfin*,¹ a case of re-

¹ 11 Ired. Law, 339 (1850).

tained possession of a slave. They are in entire harmony with the numerous cases in which mortgages on stocks of goods, with power of sale reserved, have been declared fraudulent *per se*, with the single exception that Ruffin, C. J., did not make an explicit recognition of fraudulent tendency as a basis of fraud, distinct from fraudulent intent. In the opinion of that learned judge and his associates, fraud in disputed conveyances always depends on intent; it is necessary always that the intent to defraud be ascertained or admitted; in cases where such intent does not distinctly appear, it is by a process of imputation of such intent that the law declares the transaction fraudulent; and where the real character of the agreement is involved in doubt, a verdict of a jury on the facts is required, and is always to be sought with reference to the question of intent. These opinions may be read between the lines in the cases above named. They appear more clearly in *Moore v. Collins*,¹ *Cannon v. Peebles*² and *Hafner v. Irwin*;³ in which last named case it was said by Gaston, J.: “Every contrivance to the intent to hinder creditors, directed to that end, is malicious, that is to say, wicked. Where such hindrance is but an incidental consequence of an act not directed to that end, and *bona fide* done with another and rightful intent, it may be regretted as an unfortunate result, but cannot be held to impart to the act a wicked or malicious intent.” Even these nice distinctions do not of necessity conflict with the idea that a fraudulent tendency is inherently fraudulent; for if it be said that an agreement which has such a tendency cannot in law be considered as done with “a rightful intent,” there would be room for the exercise of the North Carolina imputation of a fraudulent intent.

¹ 3 Dev. Law, 126 (1831).

² 4 Ired. Law, 204 (1843).

³ 1 Ired. Law, 490 (1841).

§ 82. **Confusion resulting from supposed distinction between fraud in law and actual fraud.** — But the principal element of confusion in these distinctions is the resulting one as to “fraud in law” and “fraud in fact,” involving, as it does, the attempt to place “fraud in law” and “actual fraud” in antithesis, and to make the latter term synonymous with fraudulent intent. If “fraud in law” can be only such fraud as the court can declare from the face of a conveyance, or from facts which are susceptible alone of a construction adverse to the transaction, and if actual fraud always has a fraudulent intent as its basis, how can the court find and declare the fraud in any doubtful or complicated case, when a jury has rendered a verdict in favor of the conveyance, no matter how thoroughly the court may be convinced that its own view, primarily, would have been otherwise? This was the problem which was presented to the learned court in *Hardy v. Skinner*¹ and *Young v. Booे*.² In each of these cases, there was a deed of trust upon property, including grain and provisions on a farm, the use of which was reserved to the grantor. In each case, the party attacking the conveyance claimed that this reservation of the use of consumable property made the transaction fraudulent in law, and asked the judgment of the court accordingly; but it was expressly admitted that there was no intent to defraud creditors, and a verdict was thereupon taken in favor of the conveyance. Thus the question was sharply presented of fraud as a conclusion of law, upon the facts of the case, irrespective of the verdict of a jury. In *Hardy v. Skinner*, the reservation of the use was for the period of three years; and the Supreme Court thought it was “a singular and extremely suspicious transaction,” and that it denoted “a part of the purpose to have been to secure a benefit to the insolvent debtor,”

¹ 9 Ired. Law, 191 (1848).

² 11 Ired. Law, 347 (1850).

and intimated that the jury, as men of common sense, should have so found. But even the inclination of the court to rest the security of the creditors "upon the fixed principles of the law, and not on the uncertain judgment of jurors," did not avail the creditors in this case. The verdict of the jury was based, in part, on the admission that there was no "fraud in fact," that is, no fraudulent intent; and the Supreme Court considered that the attacking party gave up his case by this admission; and that inasmuch as there might have been other favorable circumstances, not indeed appearing in the case, but which might have been assumed by the jury, the verdict could not be set aside; the fraud could not "be inferred absolutely, as a dry matter of law, by the court." In *Young v. Booे*, the reservation of the use was for eleven months only, and there were other circumstances in the case, favorable to the secured creditor, among them being the fact that the possession of the grantor was virtually as agent of the creditor; so that there was considerable evidence in support of the verdict. Still, the circumstances were so suspicious in many respects, that Ruffin, C. J., in his opinion, said that "without the admission on the part of the defendant, that there was no actual fraud intended in the execution of the deed, the court would hold the judgment to be erroneous." *Hardy v. Skinner* was referred to as an authority on this point, and as in that case, it was the admission that there was no fraudulent intent in the case, which sustained the verdict. It appears from these cases that the distinction taken was not one of substantive law. But for the verdict of the jury, each of these cases would have been decided otherwise. Indeed, in *Dewey v. Littlejohn*,¹ where the same question arose in equity, though the ultimate decision was in favor of the convey-

¹ 2 Ired. Eq. 495 (1843).

ance (because the reservation was found not to be for the debtor's benefit), it had been said that a conveyance of crops or other property consumable in the use, with the possession retained by the grantor for his own use, would be fraudulent. The law of North Carolina seemed, therefore, plain. The only difficulty was as to how the question should be determined in a case presented to a jury. It was a question of procedure merely; and this became important in jury cases only, in respect to the further question of the province of the jury, and the issue to be submitted to them.

§ 83. Attempt to solve the difficulty by treating fraud in conveyances as a question of procedure.— This difficulty was apparently solved in *Hardy v. Simpson*,¹ by resort to the rules of procedure concerning presumptive evidence. The controversy here was over the same deed involved in *Hardy v. Skinner*. A new suit had been brought, again attacking the conveyance; and additional evidence having been taken, a jury had again rendered a verdict in favor of the deed. Counsel had again asked the trial court to adjudge the deed fraudulent upon its face, which had been declined. On this point, the appellate court adhered to the doctrine of *Hardy v. Skinner*, in which case, it was said, “the matter is so elaborately discussed as to make it unnecessary to add another word.” But counsel had now gone farther, and had requested the trial court to instruct the jury that, upon the face of the deed, there was *prima facie* evidence of fraud, and that the defendant had offered no evidence to explain or rebut this presumption. This view was taken by the appellate court, and on this ground a *venire de novo* was awarded. *Hardy v. Skinner* was interpreted as deciding that this deed bore upon its face a presumption of fraud, which it was incumbent upon the defendant to rebut

¹ 13 Ired. Law, 132 (1851).

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by evidence; and it was held to be error in the trial court to decline to tell the jury that there was no such evidence, and “to leave the case with the jury upon a general charge as to the matter of fraud.” The rules of law in such cases were further stated as follows: “What constitutes fraud is a question of law. In some cases the fraud is self-evident, when it is the province of the court to so adjudge, and the jury has nothing to do with it. In other cases, it depends upon a variety of circumstances, arising from the motive and intent; then it must be left as an open question of fact to the jury, with instructions as to what, in law, constitutes fraud. And in other cases, there is a presumption of fraud which may be rebutted. Then, if there is any evidence tending to rebut it, that must be submitted to the jury; but if there is no such evidence, it is the duty of the court so to adjudge, and to act upon the presumption. Fraud is very subtle, and frequently eludes the grasp, both of the court and jury. When, therefore, the court has hold of it, there is no reason for passing it over to the jury, unless there is some evidence that will justify them in coming to the conclusion that the presumption is rebutted.” This case was placed by the court, not in the first named class, where the fraud is self-evident, and is so declared by the court, but in the third class, where presumptions are indulged. The case thus turns upon this question of procedure, with respect to presumptive evidence.

§ 84. Renewed difficulty in cases involving a reserved power of sale.—So when, in the recent case of *Cheatham v. Hawkins*,¹ a mortgage deed was presented, conveying a stock of goods, the mortgager reserving possession of them for nine months, “the implication being irresistible, from the very nature of the business, that he was to continue in selling and trading as before;” the case being recognized

¹ 76 N. C. 335 (1877).

as "unlike and stronger than the cases of *Young v. Booे* and *Hardy v. Skinner*;" and yet the case was to be tried as a jury case by the court, without the aid of a jury, new questions arose. How was the case to be treated? And if such a conveyance were deemed fraudulent, how should the fraud be declared? And again, if the trial judge should decide, as was done in this case, that the deed was not fraudulent, how should an appellate court, holding the contrary view, proceed in reversing the decision? In analogy to the doctrine of the earlier cases above cited, the case was treated with reference to the rules concerning presumptive evidence. The fatal features of such a transaction were clearly understood and vividly portrayed. Said the appellate court: "The merchandise retailed lost the power of identity as soon as sold. The *corpus* itself was lost and destroyed beyond pursuit or recovery. The power to sell was the power to destroy, and the sale was the destruction and extinction of the property. If there were other unsecured creditors at the time of this assignment, and no other property of the debtor than that conveyed in the mortgage, out of which creditors could make their debts, the fraudulent intent would seem to be irrebuttable." But all this was held to be only presumptive evidence. "This deed approaches the verge of being fraudulent in law, but is not so. To find fraud, as a matter of law, it must so expressly and plainly appear in the deed itself as to be incapable of explanation by evidence *dehors*." If all the other facts of the case had appeared in the deed, the court could have pronounced it fraudulent in law. But as they appeared *aliunde*, the case as presented did not call for a final judgment, but for rebutting evidence. And inasmuch as there was no evidence to rebut the presumption of fraud, the trial judge, as a court, erred in instructing himself as a jury, that there was evidence to sustain his judgment; and the case was remanded in order

that evidence to rebut the presumption might be introduced. On the same principle proceeded the case of *Holmes v. Marshall*,¹ where there was a trust deed upon a stock of goods, the power of disposition appearing simply from the recital giving the grantors "the privilege of continuing their business for one year." The trial court had applied to the case the rule of procedure approved in *Hardy v. Simpson*, and had charged the jury that the deed was presumptively fraudulent, and that there was no evidence to rebut the presumption. The appellate court sustained the verdict, holding that the mere ignorance of the grantee concerning other debts owing by the grantor was no evidence at all in rebuttal of the presumption; and thus the conveyance was declared fraudulent. In the succeeding year, again arose the preceding case of *Cheatham v. Hawkins*,² and this time with evidence offered on both sides in respect to the presumption of fraud; and the trial court and the appellate court were both of the opinion that on the whole case the presumption was not rebutted. The mortgage deed was accordingly adjudicated fraudulent. The cases of *Collins v. Myers*,³ *Griswold v. Sheldon*,⁴ and *Bank v. Ebbert*⁵ were referred to, with approval of their declarations that such conveyances were fraudulent *per se*; and it was said: "Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which, from its consequences, the law pronounces fraudulent, he is held to intend the fraud inseparable from the act. To leave a stock of goods, after they have been conveyed by mortgage, in the debtor's possession, and subject to his exclusive con-

¹ 78 N. C. 262 (1878).

⁴ 4 N. Y. 581.

² 80 N. C. 161.

⁵ 9 Heis. 153.

³ 16 Ohio, 547.

trol and disposition as if they were his own, while they are at the same time placed beyond the reach of execution, *is itself a fraud.*" The conclusion is that the presumption of fraud upon the face of the mortgage deed was so strong in the first place that it was almost impossible to repel it, and that it was made a little stronger by evidence of "the surrounding facts of the case and the uses made of the goods."

The later case of *Boone v. Hardie*¹ illustrates still more clearly the distinction taken in this State as to the mode of procedure. It was another case of a deed in trust on a stock of goods, the proof as to power of sale appearing from evidence *aliunde*, and fraudulent intent being negatived. The appellate court repeated and approved the division of fraud in such cases into three classes, which was made in *Hardy v. Simpson*, and held that the third class of fraud, namely, that resting in and proven by intent, was not involved in the case; and an issue having been submitted to the jury on this point, it was held to have been an immaterial issue. The trial court had been of opinion that the deed was fraudulent upon its face; but the appellate court held otherwise, and considered it a case involving a presumption only, in which the presumption was required to be rebutted. Inasmuch as this precise question had not been submitted to the jury, the judgment adverse to the validity of the conveyance was reversed and a new trial was ordered. Yet the case on the whole was very similar to *Cheatham v. Hawkins*, the language of the opinion in which, at the last hearing, was cited with approval.

§ 85. The doctrine in question enforced as a rule of presumptive evidence. — It thus appears that the doctrine of the North Carolina courts accords with that of other States named, in opposition to the validity of this class of conveyances. But it is to be enforced in their own peculiar

¹ 83 N. C. 470 (1880).

way, so as to preserve the harmony of the State jurisprudence on the subject of procedure. The reservation of a power of sale in the usual course of business does not constitute self-evident fraud, or make the conveyance fraudulent *per se*; but it creates a presumption of fraud so strong, that theoretically it is almost impossible to rebut it, and in practice it is quite so. The trial court is not allowed to declare such a conveyance fraudulent *per se*; but on the other hand, it must tell a jury to accomplish the same result by apt application of the rules of presumptive evidence; and should a jury fail to do this, there must be a new trial to the same end before another jury. Such conveyances do not, therefore, fare better in the courts of this State than in those of Virginia, New York or Ohio.

ARKANSAS.

§ 86. Arkansas approves the doctrine unqualifiedly. — In the case of *Sparks v. Mack*,¹ the Supreme Court of Arkansas was not called upon to determine the precise question, the substantial controversy being over the matter of a general reservation to the use of a grantor in an absolute conveyance; but incidentally the question was considered in connection with a stipulation similar to that discussed in *Robinson v. Elliott*, and the court said plainly that if the absolute conveyance were to be construed as being in effect only a mortgage security, the case would come directly within the ruling in *Robinson v. Elliott*. This is an evident concurrence in the general doctrine of that case.

NEBRASKA.

§ 87. Nebraska adopts the doctrine with limitations. — The Supreme Court of Nebraska in *Tallon v. Ellison*² held a mortgage on a stock of goods, with a power of sale re-

¹ 31 Ark. 666 (1877).

² 3 Neb. 63 (1873).

served by the mortgager, to be fraudulent and void, referring for authority to the New York and Ohio cases, and quoting from the language used in *Collins v. Myers*.¹

This ruling was afterwards limited in its application to cases where the power of sale is expressed on the face of the instrument;² and it was suggested that a provision that the mortgager might "retain the use" could not "be tortured into a power of sale." In all such cases it was held that "the question of fraudulent intent is a question of fact which must be submitted to a jury." Accordingly, in another case at the same term, the court declined to take the view that an agreement between mortgager and mortgagee allowing sales by the former would be fraudulent, irrespective of intent. The trial court had been asked to so instruct the jury, but had refused, and the Supreme Court approved this action, held the case to be one turning on intent, and sustained the verdict of the jury in favor of the transaction, on the ground that the question of intent had been submitted under a proper charge.³

Where, however, the agreement allowing sales appears on the face of the mortgage, it was intimated that the rule of *Tallon v. Ellison* would be adhered to, though the question in the particular case was as to the validity of the transaction between the parties.⁴ This view that the fraudulent agreement must appear on the face of the instrument, in order that the court should rule upon it as a question of law, evidently controlled the decision in the late case of *Book Co. v. Sutherland*,⁵ where the mortgager remained in possession and continued his business, and the controversy, between the mortgagees and one who purchased from the

¹ 16 Ohio, at p. 554.

² *Williams v. Evans*, 6 Neb. 216 (1877).

³ *Hedman v. Anderson*, 6 Neb. 392.

⁴ *Gregory v. Whedon*, 8 Neb. 873 (1879).

⁵ 10 Neb. 884; 6 N. W. Rep. 867 (1880).

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mortgager in payment of an old debt, was settled with reference to the question of notice to such purchaser of the mortgage; and the question of fraud inherent in the transaction was not referred to by the court, and apparently was not argued by counsel.

In this State, the statutes make all mortgages of chattels, unaccompanied by delivery thereof, presumptively fraudulent as to creditors, and require, in order to avoid the presumption, proof of good faith and of the absence of fraudulent intent. These provisions were held, in *Turner v. Killian*,¹ to apply to a mortgage upon a stock of goods, under which the mortgager retained possession in order to sell the goods and remit all the proceeds to the mortgagees; provisions which would be held not fraudulent in many jurisdictions; and it was held that this mortgage, when attacked, could be sustained only by proof that it was "really made in good faith and without any intent to defraud."

In *Marsh v. Burley*,² it was held that recording such a mortgage would not relieve it from this difficulty, and that the registration acts were not intended to make the recording of the mortgage an equivalent for change of possession, as had "been inadvertently stated" in an earlier case; and for this conclusion *Horton v. Williams*³ and *Wood v. Lowry*⁴ were cited as authorities.

Thus it appears that on the whole, the doctrine in question is favored in Nebraska, though somewhat embarrassed with limitations and statutory provisions.

¹ 12 Neb. 580.

² 13 Neb. 261.

³ 21 Minn. 187.

⁴ 17 Wend. 492.

CHAPTER V.

THE VIEWS OF THE AMERICAN MINORITY.

SECTION 88. The Michigan view; fraud in conveyances always rests upon intent; a dissenting opinion.

89. Such conveyances uniformly sustained in Michigan.
90. Reserved power of sale immaterial in Iowa; the common-law rule abolished by statutes.
91. Such conveyances common in Iowa, and beyond criticism; *Stare decisis*.
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94. Reserved power of sale merely a badge of fraud in Massachusetts.
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96. The doctrine and the practice settled in Massachusetts.
97. The Maine view; the question one as to evidence merely.
98. Reserved power of sale merely a badge of fraud in Kentucky.
99. The question of fraud as shown by mere possession, not well settled in Kentucky.
100. The Kansas view; the question of the fraudulent character of such conveyances, one of good faith.

MICHIGAN.

§ 88. **The Michigan view; fraud in conveyances always rests upon intent; a dissenting opinion.** — The courts of six of the States have, while not concurring in their reasons, committed themselves severally to the support of conveyances of this class. They are upheld in Michigan, upon the theory that fraud as a result of a reserved power of sale cannot be declared except as resting in intent, and is therefore to be considered a question of fraud in fact, and not of fraud in law. The law was thus announced in the cases of *Oliver v. Eaton*¹ and *Gay v. Bidwell*,² which present

¹ 7 Mich. 108 (1859).

² 7 Mich. 519.

the question fairly for consideration. In the former case the question was reserved whether power allowed to the mortgager of a stock of goods, to sell in the usual course of trade and control the proceeds, renders the mortgage void as to creditors, irrespective of intent; which was answered in the negative, sustaining the verdict of a jury in favor of the conveyance. The burden of the case is that the statute in this State, (as in Indiana), makes the question of fraudulent intent a question of fact for the jury, which provision the court cordially approves, as "undoubtedly introduced to create or settle a rule of law." The court agrees that "the law, where an instrument contains illegal provisions, and such as are not reconcilable, on any possible hypothesis, with an honest or legal intent, declares it void upon its face, because no evidence could change its character;" but the case at bar is held not to be within that rule. It is apparently assumed that fraud cannot be declared to pertain to such conveyances unless the intent to defraud can be clearly imputed to the parties.

In an earlier case, the Supreme Court of this State had taken broader ground than this, and had given a more restricted construction to the statute referred to. *Pierson v. Manning*¹ was a case of a general assignment for creditors, attacked in a court of law for alleged fraud; and upon a question reserved as to its validity, the Supreme Court declared it void by reason of a resulting trust for the grantor, appearing by legal implication from the provisions of the assignment. The statute was urged upon the court, as requiring that the question of fraud be submitted to the jury. But the court said that this would be "carrying that provision of the statute entirely beyond what the Legislature ever intended, or it will legally bear; it is not to be presumed that the Legislature intended, by this simple provision, to

¹ 2 Mich. 445 (1852).

make such a radical reform as to turn principles of law into questions of fact, nor does it in fact or inferentially do so." This decision is not referred to in the opinion in *Oliver v. Eaton*.

Gay v. Bidwell arose in chancery; the power of sale by the mortgagors appeared by plain implication on the face of the mortgage, the provision being that they should not "sell and dispose of said goods and chattels otherwise than in the ordinary course of their usual business;" and the court, in its own view, was placed face to face with the question, "Were, then, the facts such as to create a legal fraud, notwithstanding the actual good faith of the parties?" It was thought not, because it is a cardinal rule, never to infer a dishonest meaning, if an honest one is possible. The statute, as its design was explained in *Oliver v. Eaton*, was held to apply to the case as fully as if it were before a jury, the case being considered an excellent one for illustrating the statute. "How can any one," asked the court, "from the face of this mortgage, and without reference to extraneous facts, draw any conclusion whatever, concerning either its intent or its bearing upon creditors? It would certainly be valid under any circumstances if there were no creditors. It does not appear from the mortgage that there were any. It would not injure other creditors if they were abundantly secured. It does not show they were not. It would not be void if they had authorized it. And many other cases might be suggested, showing that, without proof of external facts, there could be no conclusive presumption at all. And of all those outside facts, the jury are sole arbiters under any theory." The court further said: "To hold that a merchant cannot mortgage his goods without closing his doors, would be to hold that no mortgage of a merchant's stock can be made at all. We cannot so hold until the statutes declare a new rule." The case of *Pierson v. Manning* was not referred to as at all apposite to the case, except by one dissenting

judge, who would have decided the case otherwise and in accordance with the New York and Ohio authorities. This judge drew the distinction between fraud resting in intent, and fraud shown by the tendency of the transaction, in these words: "There are two kinds of fraud; fraud in law and fraud in fact. When courts say an instrument is fraudulent on its face, or in law, I do not understand them to mean it is made with a corrupt intent, but that it is an instrument the law will not sanction or give effect to, as to third persons, on account of its susceptibility of abuse, and the great danger of such contracts being used for dishonest purposes. Hence, in many cases, the law has shaped and given form to contracts, on which form their effect or legality is made to depend." It is in accordance with these views that, in other jurisdictions, similar conveyances have been held to disclose a tendency so potent for fraud, as to furnish all the facts necessary for an adjudication of fraud, and to dispense with any inquiry by the jury as to the intent of the parties. It was, however, the opinion of the majority of the court in this case, that "no court has given any satisfactory reason why such a provision should necessarily vitiate a chattel mortgage, although it is undoubtedly liable to abuse."

§ 89. Such conveyances uniformly sustained in Michigan. — This question has several times since been re-argued before the Supreme Court of Michigan, but the rulings in these cases are adhered to. In *People v. Bristol*,¹ it was said that the question of the authority left in the mortgager to dispose of his goods in the usual way was settled and "not open to controversy;" in *Wingler v. Sibley*,² such conveyances were said to be "uniformly held valid;" and to the same effect is *Cadwell v. Pray*.³ Other and frequent cases show the execution of these mortgages to be a

¹ 35 Mich. 28 (1876).

² 35 Mich. 231.

³ 41 *Id.* 307.

common practice in Michigan.¹ In *Leland v. Colver*,² the stock of goods had, subsequent to the mortgage, passed into the hands of several successive vendees, each of whom, having had notice, was held to be a trustee as to the mortgaged property, so the mortgagee thus traced his fund into the stock of goods in the hands of the last vendee.

IOWA.

§ 90. Reserved power of sale immaterial in Iowa; the common-law rule abolished by statutes. — The rule adopted by the Supreme Court of Iowa, in reference to this class of cases, is unqualifiedly opposed to the doctrine of *Robinson v. Elliott*. The courts of that State can have no independent opinion upon the question of fraud involved, but it is left to the jury to be determined as a question of fact, apparently with reference to the intent of the parties. It is, however, conceded in Iowa that this rule is peculiar to that State, and is based upon the provisions of their statutes, and that the common-law rule, in the absence of these statutes, would be otherwise. *Torbert v. Hayden*³ and *Hughes v. Cory*⁴ are the leading cases, each of which presented the question fairly. *Torbert v. Hayden* was a mortgage upon a stock of goods to secure a debt running twelve months, the mortgagors continuing their usual sales with the assent of the mortgagee, and using the proceeds for their own benefit; and the trial court followed the New York and Ohio cases, charging the jury that if these facts were found, the mortgage was fraudulent and void as to creditors. *Hughes v. Cory* was a similar case in most re-

¹ *Cigar Co. v. Foster*, 36 *Id.* 368; *Robson v. Railroad*, 37 *Id.* 70; *Willison v. Desenberg*, 41 *Id.* 156; *Bank v. Kent*, 43 *Id.* 292; *Adams v. Niemann*, 46 *Id.* 135; *Keables v. Christie*, 47 *Id.* 594; *Laing v. Perrott*, 48 *Id.* 298; *Curtis v. Wilcox*, 49 *Id.* 425.

² 34 *Id.* 418.

³ 11 Iowa, 435 (1861).

⁴ 20 *Id.* 399 (1866).

spects, the power of sale appearing on the face of the mortgage; and the trial court held the instrument fraudulent and void, and excluded it as evidence. The Supreme Court reversed both these cases, and in each instance gave elaborate reasons for its action. It was said that the views of the trial court "harmonize with the English common-law doctrine, and have for their authority quite a number of American decisions;"¹ and that "such an instrument would, by the English courts, be deemed fraudulent at common law and under 13 Elizabeth, because the mortgager was allowed to retain possession and to make sales from the goods."²

But the Iowa statute was held to change the rules of law, and to lead to a different conclusion. This statute declares that possession retained under a chattel mortgage shall not invalidate it, if the mortgage shall be duly executed, acknowledged and recorded; the legal effect of which is declared to be equivalent to actual delivery of the property. This statute is similar to those of Illinois, Minnesota, and other States; but the judicial construction of it in Iowa is far different. It is there supposed that this provision of law removes all the difficulties which attend upon possession in every case, so that even possession with power of disposition loses all its pernicious features. The Ohio cases which take the contrary view are distinguished by the circumstance that the Ohio statute does not go so far as to make registration of the mortgage equivalent to an actual delivery of the property; "hence the legal effect of possession by the mortgager there, so far as the rights of third persons are concerned, must be somewhat different from what it is here."³ The Ohio cases are commended as probably correct expositions of the results flowing from such conveyances in Ohio; but like results could not follow

¹ Lowe, C. J., 11 Iowa, at p. 439. ² Dillon, J., 20 Iowa, at p. 401.

³ 11 Iowa, at p. 442.

in Iowa. Lowe, C. J., said: "It is true that if the mortgager is permitted to deal with the property as his own, the mortgage security is not altogether safe or certain; much is necessarily left to the honesty and good faith of the debtor; but if this confidence is abused, it is the misfortune of the mortgagee, and furnishes no ground of complaint to other creditors. They are no worse off than they would have been if no mortgage had ever been executed. To them it can make no difference whether the mortgaged property is in the possession of the mortgager or mortgagee. In neither event is the property altogether beyond their reach or control, as it is stated to be under the Ohio laws. It surely would be competent for the creditor, before forfeiture, to pay the mortgage debt, and then seize."¹ Dillon, J., in stating the doctrine of *Torbert v. Hayden* to be the settled law in Iowa, elaborated these arguments, with a view of showing what remedies creditors might have, despite the disputed mortgage.² He furthermore drew the distinction between fraud in law and fraud in fact, and while he held that fraud is always, after the facts are proved, an inference of law, and that the jury is, under the direction of the court, bound to find it, he treated the mortgage under consideration as not possibly fraudulent in fact, and sustained it as valid under the Iowa statute.³ It is intimated, however, that a fraudulent intent, or a reservation to the use of the debtor, might still suffice to invalidate such a conveyance, even though well registered. But the control of the mortgager of his goods, in the usual course of trade, does not appear to the learned court, in any respect, in the light of a reservation to his own use.

The rule thus adopted has been adhered to in Iowa, and the cases announcing it have been cited as authorities indiscriminately in cases of retained possession under various cir-

¹ p. 443.

² 20 Iowa, p. 407-8.

³ 20 Iowa, at p. 405.

cumstances. *Torbert v. Hayden* was declared to furnish the law for the cases of *Campbell v. Leonard*¹ and *Wilhelmi v. Leonard*,² which apparently involved the question of retained possession only, without power of disposition; for the case of *Jessup v. Bridge*,³ which was a mortgage upon a railroad, with its rolling stock and accretions, as to which the necessities of commerce have established a peculiar doctrine; and also for the case of *Adler v. Claffin*,⁴ which was a mortgage upon a stock of goods, all the proceeds of sales, after paying expenses, to be paid over to the mortgagees.

§ 91. Such conveyances common in Iowa, and beyond criticism; Stare decisis. — From the cases of *Doane v. Garretson*,⁵ *Allen v. McCalla*,⁶ *Stephens v. Pence*,⁷ *Phillips v. Both*,⁸ and *Clark v. Hyman*,⁹ it appears that mortgages upon stocks of goods in trade are of frequent occurrence in Iowa. In the last named case, Day, J., recurred to the discussion and decision of the earlier cases, in the following words:

“ It is claimed, however, that *Hughes v. Cory* is not only opposed to the weight of authority, but wrong in principle, and we are asked to overrule it. That case was determined in 1866. It received the most careful and deliberate consideration. It discusses the rule at common law, and in many of the States of our Union, and shows its inapplicability to the peculiar provisions of our statute. For fourteen years, this decision has been regarded as an authoritative settlement of the questions involved in it. We ought not now to be expected to enter upon a re-examination and re-consideration of these questions.

¹ 11 Iowa, 489.

⁵ 24 *Id.* 351.

² 18 *Id.* 830.

⁶ 25 *Id.* 465.

³ 11 *Id.* 572.

⁷ 56 *Id.* 257.

⁴ 17 *Id.* 89.

⁸ 58 *Id.* 499.

⁹ 55 *Id.* 14; 39 Am. Rep. 160 (1880).

“‘ The rule *stare decisis* is one of the most sacred in the law.’ It is even of ‘ more importance that a rule should be fixed and stable, than that it should be strictly just.’ If we should disregard the maxim *stare decisis*, ‘ like the ever returning but never ending labors of the fabled Sisyphus, we would, in each recurring case, have to enter upon its examination and decision as if all were new, without any aid from the experience of the past, or the benefit of any established principle or settled law. Each case, with its decision thus limited, *as law*, to itself alone, would in turn pass away and be forgotten, leaving behind it no record of principle established, or light to guide, or rule to govern the future.’¹

“ If it be true that the rapidly increasing commercial interests of the State require that a merchant desiring to secure his creditor upon his stock of goods shall surrender the goods and quit business, rather than that he shall be allowed to continue business in the usual way, the most cogent and controlling reasons require that such a rule of law shall be declared by the Legislature, and not by this court.”²

From these remarks, the nature and character of the arguments addressed to the court may be inferred. The case presented was a “ mortgage of a stock of merchandise, accompanied with an arrangement for sales in the usual course of trade.”

Such mortgages are held valid as to accretions to the stock of goods made by purchase;³ but it is doubted by the courts whether the principle should be extended to cover crops not planted.⁴

¹ Ram’s Legal Judgt., Am. Ed. pp. 234, 199, 415.

² 55 Iowa, at p. 20.

³ Scharfenburg *v.* Bishop, 35 Iowa, 60; Stephens *v.* Pence, 56 *Id.* 257.

⁴ Muir *v.* Blake, 57 Iowa, 662; Pennington *v.* Jones, 57 *Id.* 37.

§ 92. The reasons for the Iowa rule examined.— Elaborate as are the explanations made in *Hughes v. Cory* and *Torbert v. Hayden*, of the reasons for sustaining such conveyances, they are yet disappointing in several respects. First, no adequate attention is given to the circumstance that the control of the mortgager over the mortgaged property is practically unlimited while it continues, so as to enable him, if he chooses, to secrete or dispose of it; or to the circumstance that in every such case, where the proceeds are not to be paid over to the mortgagee, the continuance of the business is in reality a continuance for the benefit and in the interest of the debtor himself. Second, the ability of another creditor to levy on the surplus of the goods, outside of the portion covered by the mortgage, which the learned court considered conclusive as to his complaint, is in reality the ability only to levy on so much of the portion not covered as the honesty of the debtor will allow to remain on hand, and not secretly disposed of; and the opinions of the learned court do not appear to consider the possible convenience for dishonesty thus afforded. The ready opportunity which the Iowa practice offers for the appointment of a receiver will secure to the complaining creditor only such portion as is left, after the debtor has worked his pleasure with the goods. It is under cover of a mortgage which is upheld as valid, that a dishonest debtor may thus work; though these possible consequences were involved in the transaction from the beginning. Third, the provision of the Iowa statute, that registration of a mortgage shall "have the same effect as though it had been accompanied by the actual delivery of the property," while it may well establish a statutory *prima facie* validity, can scarcely be supposed to have the effect of eliminating all possibilities of fraudulent conduct. If it were so intended, this would be a mere fiction, which a court might readily expose. Even in case of an actual manual delivery,

the efficacy of such delivery would be completely nullified by allowing the mortgager to resume the potential control and disposition of the property; and it would seem that any court might well tell a jury that such a subterfuge would be essentially fraudulent, whether so intended or not.

§ 93. The Iowa view of other frauds in conveyances.—In its treatment of the question of fraud as presented in some other aspects in conveyances, the jurisprudence of Iowa does not seem peculiar. In *Macomber v. Peck*,¹ it is held that if a vendor of land, by a secret arrangement with the vendee, reserve to himself the use of the land for a time without rent, such agreement renders the conveyance “fraudulent in law, irrespective of the intention with which it was executed.” *Lukins v. Aird*² is cited as a direct authority for this ruling; in which case the Supreme Court of the United States held the fraud to be inherent in the arrangement, as a conclusion of law, which the court was as much bound to pronounce as if a fraudulent intent were proved. But when, in *Jordan v. Lendrum*,³ a case was presented of a conveyance of chattels, with the use allowed to the grantor of property consumable in the use, and *Lukins v. Aird* was cited as an authority in point on the subject of fraudulent reservation, it became pertinent to offer explanations as to the distinction between *Macomber v. Peck* and the class of cases represented by *Hughes v. Cory*, which explanations further illustrate the peculiarities of the Iowa law. Referring again to the provisions of the Iowa statute which give to the registration of any bill of sale or mortgage of personal property “the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged,” the court said: “It could not have been the purpose of these sections to simply authorize the vendor to retain the naked possession of the property without any

¹ 39 Iowa, 351 (1874).

² 6 Wall. 78.

³ 55 Iowa, 478 (1881).

enjoyment of it. It is not the policy of the law to place property in such a situation that it cannot be beneficial or useful. If the vendor has received an actual consideration for the property sold, it can be no disadvantage to creditors that he is allowed to remain in possession of the property, exercise acts of ownership and control over it, and to use and dispose of it, or convert it to his own use. Such control and use only better the financial condition of the vendor, render him more able to pay his debts, and thus benefit rather than injure his creditors. If it should be made *part of the consideration of the sale* that the vendor should retain the possession and use of the property sold, this might enable the vendor to place part of the consideration received beyond the reach of his creditors, and thus perpetrate a fraud upon them, if the transaction should be sustained. This is the doctrine of *Macomber v. Peck*."

Two features are noticeable in these explanations. One is the distinction that is taken between an agreement to allow the vendor the use and control of the property, which is made as a part of the consideration of the transaction, and a similar agreement, which is made either expressly or tacitly, after the main transaction, but in connection with it; as to which, it seems somewhat puzzling to understand why the subsequent agreement should be sustained in *Jordan v. Lendrum*, and the contemporaneous agreement should be condemned in *Macomber v. Peck*, when the result in each case is substantially the same as to the rights of the complaining creditor. The other feature is, the view that the use and control of property by a vendor or mortgager cannot possibly result in any injury or disadvantage to creditors. It has not generally been supposed that the injury to creditors was inherent in the simple control of the property of the debtor. Undoubtedly, an increase of assets in the debtor may enure to the benefit of the creditor; but this benefit can be secured to him only by allowing him to

treat the additional assets as the property of his debtor. The injury which he experiences results from depriving him of these assets, by allowing a mortgagee to say, "This property belongs to your debtor only in appearance; in fact and in law it belongs to me." It is the assertion of a right by the mortgagee, antagonistic to the right of property in the debtor, which operates injuriously to the general creditor. These views, in common speech, crystallize into the statement that the conveyance, or the transaction, is void because fraudulent as to creditors. In physics, as a result of an accidental breach of the laws of gravitation, it is said that a man is seriously injured by falling from a house-top; and it is but a play upon words to say that it is not the fall, but the too sudden stoppage, that causes the injury. And in jurisprudence, the doctrine of estoppel by conduct is based nominally upon the injury resulting to some person who is affected by the conduct; but the injury does not in fact result from the conduct alone. Injury would result from allowing an act to be done inconsistent with the previous conduct on which the party relied; and to avoid this injury the law prevents the performance of the inconsistent act, or if performed, treats it as null and void; for to give it effect would operate as a fraud. In fact, the principle of fraud inherent in mortgages under which an inconsistent power of disposition is reserved, might well be called as it has sometimes been, a variety of estoppel. Estoppel and fraud are frequently spoken of as terms describing substantially the same class of cases; and in the class of conveyances referred to, the intent of the parties would be wholly immaterial in considering the question of Estoppel, and it would seem, should be equally so if the question considered be that of Fraud.

MASSACHUSETTS.

§ 94. Reserved power of sale merely a badge of fraud in Massachusetts. — In a recent case in this State,

Fletcher *v.* Powers,¹ where the question is sharply presented by the power to the mortgager, reserved in the mortgage, to sell the goods in the regular course of his trade, it was said by the Supreme Judicial Court to be no longer an open question, “it having been repeatedly held that such a power given to the mortgager does not *per se* avoid the mortgage, but is at most only evidence of a fraudulent purpose, to be submitted to the jury.” This view seems to have been advisedly adopted, though without as full an expression of the reasons for its adoption as has been made by other courts.

§ 95. **Earlier cases inharmonious.**—The earlier cases in this State on the subject of fraud in conveyances were not entirely harmonious. In Harris *v.* Sumner,² where a reservation for the benefit of a grantor appeared on the face of an instrument, and counsel contended that “it should have been left to the jury to decide upon the whole matter whether the conveyance were fraudulent or not,” the court dissented, saying, “Where the defect is apparent upon the deed itself, the effect of it becomes a question of law; it would be worse than useless to submit it to the jury to say, upon such evidence, whether it should be void against creditors or not, when if they should happen to decide against the legal effect of the instrument, it would be the duty of the court to set aside the verdict.” In Johnson *v.* Whitwell,³ a power of revocation agreed upon in connection with a deed of land, was held to vitiate it; and it was said, “although no moral fraud was intended, yet it was a legal fraud.” In Foster *v.* Manufacturing Co.,⁴ where the mortgage stipulated that the grantors should “remain in possession of all the property, and sell and dispose of all the personal property except machinery, ac-

¹ 131 Mass. 333 (1881).

² 2 Pick. 129 (1824).

³ 7 Pick. 71 (1828).

⁴ 12 *Id.* 451 (1832).

cording to the usual course of their business," Shaw, C. J., said: "The first obvious remark is, that this assignment, as to the personal estate, was inoperative and void, against any creditor who should have attached before the trustees took possession. The stipulation that the vendors should remain in possession and have the use of the property would have rendered it void as against creditors." The case was, however, saved to the mortgagees by their having taken possession of the property before the adverse proceedings were commenced.

In the cases of *Allen v. Smith*¹ and *Macomber v. Parker*,² which involved bricks divided between joint owners, the maker of them being left in possession with power to sell, it appeared that he acted merely as the agent of the other party, who was to have all the benefit of sales made; and this circumstance controlled the decision in each case. *Shuttleff v. Willard*³ and *Robbins v. Parker*⁴ involved mortgages upon hay, grain and farming produce, consumable in use, and part of which was consumed by the mortgager in each case. In *Robbins v. Parker*, this was held to make the transaction fraudulent as to creditors, in accordance with the Tennessee case of *Sommerville v. Horton*;⁵ the court carefully making the distinction, that it was not the retention of possession alone, even of articles consumable in the use, but it was that possession and use which implied the consumption of perishable articles, which was the vicious feature of the transaction. In *Shuttleff v. Willard*, this principle was assented to, but not applied directly by the court; the facts referred to were simply evidence to go to a jury. *Codman v. Freeman*,⁶ which is often referred to as an authority in this connection, involved a mortgage on household furniture, which was certainly not perishable property;

¹ 10 Mass. 308 (1813).

⁴ 3 Metc. 117 (1841.)

² 14 Pick. 497 (1833).

⁵ 4 Yerg. 540; 26 Am. Dec. 242.

³ 19 Pick. 202 (1837.)

⁶ 3 Cush. 806.

and the only sales allowed under it were by way of exchange of furniture, the new to be substituted for the old under the mortgage; and this was held valid as to the property actually covered by the mortgage at its date, which was the only property involved.

In two cases, involving a general assignment of real and personal property, which was left in the possession of the assignor with the stipulation that he should "commit no waste thereon," it was held that possession under these circumstances did not invalidate the assignment.¹

§ 96. The doctrine and the practice settled in Massachusetts.—The question as to stocks of merchandise first came fairly before the court in *Briggs v. Parkman*,² in which it was held that an agreement under a chattel mortgage on a stock of goods in trade, that the mortgager should keep possession and continue to make sales in the ordinary course of business, applying the proceeds to his own use, was not fraudulent in law; that while it *tended* to prove a fraudulent intent, it might be explained consistently with fair dealing; and that if explanations of good intent were offered, they should be received and credited. Though a chancery case, in which all questions involved were to be tried by the court, and in which parties agreed that the court might draw any inferences from the facts which a jury might draw, the rule was applied that possession in such cases is only presumptive evidence of fraud, which should be submitted to a jury. Then considering the case as a jury would do, in the light of the intent of the parties, the court, in view of the fact that the mortgager had agreed that "he would not make any large sales," found that there was no intent to defraud. Thus the decision was rested wholly upon the question of a fraudulent intent. It should be

¹ *Baxter v. Wheeler*, 9 Pick. 21; *Russell v. Woodward*, 10 *Id.* 408.

² 2 Met. 258; 37 Am. Dec. 89. (1841).

noted that the rule applying to cases of mere retention of possession was taken as the rule for this case, and that no distinction was observed as to the element of the reserved power of sale, which was considered to have no other effect than mere possession, except, possibly, to "raise a stronger presumption of fraud."

This case was approved and affirmed in *Jones v. Huggeford*,¹ where the contract was that the mortgager should apply the proceeds of sales, first to the purchase and substitution of new goods, and afterwards to the payment of the mortgage debt. It was announced as the Massachusetts doctrine that only "fraud in fact" or in the intent of the parties will suffice to vitiate such a transaction. And the rule being adhered to that such a contract as that in *Briggs v. Parkman* is not fraudulent *per se*, but furnishes only presumptive evidence, which should be passed on by a jury, no difference was seen between the two cases as to the fact that in the later case, the mortgagee did in reality secure the proceeds of the sales.

The question arose again in *Barnard v. Eaton*,² where the mortgage was much like that in 3 Metc., but it was treated lightly in the Supreme Judicial Court and passed by without much comment.

Again, in *Cobb v. Farr*,³ the question arose under a mortgage providing that the proceeds of sales should be applied to the purchase and substitution of new goods; and the mortgage was sustained without comment, the court being evidently satisfied with the rulings announced in *Briggs v. Parkman* and *Jones v. Huggeford*.

And in *Rowley v. Rice*,⁴ where a mortgage was presented which was expressed to cover all such goods as the mortgager might put in to supply the place of those he should sell, the court confined its attention to the question of the

¹ 3 Met. 515.

² 2 Cush. 294 (1848).

³ 16 Gray, 597 (1860).

⁴ 11 Met. 333.

§ 97 FRAUDULENT MORTGAGES OF MERCHANDISE.

validity of the mortgage as covering the after acquired property ; the reservation of a power of sale was not considered, nor was the distinguishing circumstance that the mortgagee had taken possession of the goods before the controversy arose.

From the frequency of cases in the Massachusetts courts, in which mortgages have been given on stocks of goods in trade, the practice of making such contracts seems to be quite common. In several of the cases, the feature of the mortgager's power of sale received no attention.¹ In one case the mortgage stipulated against the exercise of such a power by the mortgager. The mortgagee testified : "I said he might go on and do business as usual for all me." This was simply evidence for the jury, under the Massachusetts rule. The trial court properly declined to direct a verdict.²

It is made by statute, in Massachusetts, a criminal offence for a mortgager of personal property to sell it without the written consent of the mortgagee.³

And as to a pledge of personal property in this State, it may be noted that a pledgee leaving the property in the hands of the pledger would lose his security.⁴

MAINE.

§ 97. **The Maine view ; the question one as to evidence merely.** — In Maine the question has not been thoroughly discussed. The earlier cases of *Melody v. Chandler*⁵ and *Abbott v. Goodwin*⁶ are not in point, though mortgages on

¹ *Flood v. Clemence*, 106 Mass. 299; *Folsom v. Clemence*, 111 *Id.* 273; *Pratt v. Maynard*, 116 *Id.* 388.

² *Sleeper v. Chapman*, 121 *Id.* 404.

³ *Commonwealth v. Damon*, 105 *Id.* 580; *Commonwealth v. Strangford*, 112 *Id.* 289.

⁴ *Thompson v. Dolliver*, 132 Mass. 103.

⁵ 12 Me. 282.

⁶ 20 Me. 408.

stocks of goods in trade, because in these cases, the mortgager, though left in possession, was there only as the agent of the mortgagees, to whose use and benefit all the proceeds of sales were expressly to be applied. In *Melody v. Chandler*, it was said: "He is to be considered as the agent or servant of the plaintiff, employed for a specific purpose, and invested with no other power than what is requisite to enable him to execute his agency. His possession of the chattels entrusted to him is the possession of his principal." And in *Abbott v. Goodwin*, it was said: "They secured to themselves the power to control the proceeds for the same purposes for which the goods were mortgaged." To the same effect was *Cutter v. Copeland*.¹ It is, therefore, inaccurate to cite these cases as authorities on the question of a power of sale reserved to the mortgager in his own right, or in his discretion. *Abbott v. Goodwin* is recognized as authority for cases where the mortgagers under such a conveyance are made the agents of the mortgagees, to sell for their benefit alone, in the recent case of *Allen v. Goodnow*;² which case, being a controversy between the parties themselves, did not present the question under discussion in any form. Nor can *Stedman v. Vickery*³ be properly cited as an authority in this connection, for the reason that it was a case arising under a trustee's disclosure, in which the question of fraud would be pretermitted by the principle that the contract was good between the parties.

*Googins v. Gilmore*⁴ presents the point, though not at all decisive of it as a question of substantive law, for it decides merely that the courts of Maine will not declare any such conveyance fraudulent in itself, or treat it as conclusively so, but will, on the theory of a mere presumption, leave the question of fraud to the jury. There the mortgage which allowed the mortgager to remain in possession, with an

¹ 18 Me. 127.

³ 42 Me. 132.

² 71 Me. 420 (1880).

⁴ 47 Me. 9 (1859).

understanding that he was to go on as before in control of the goods and his business, was supported, the jury having sustained it on the question of fraud in fact. The courts followed the uniform practice in that State of submitting the question of fraud to the jury, a practice which the earliest cases show was adopted implicitly from the parent State of Massachusetts. How slight attention has been given in Maine to the vital question in these cases is evident from the curious cases of *Chapin v. Cram*¹ and *Partridge v. White*.² The first named case was a contest between two successive mortgagees of a trader's stock of goods, over goods valued at \$25, added to the stock between the dates of the two mortgages, and as to which the later mortgagee prevailed over the prior. In the last named case, in which also the parties were successive mortgagees of a stock of goods, the defendant, who was the prior mortgagee by several years, lost his case because he failed to identify any of the goods then on hand, as in the stock when it was mortgaged to him.

*Sawyer v. Pennell*³ was a controversy between a mortgagee under a mortgage upon a stock of goods, and an attaching creditor; and the latter prevailed, the question involved being one of notice to him of the mortgage, "there being no fraud alleged on either side." The report does not disclose the facts as to the mortgager's power of sale. In *Brown v. Thompson*,⁴ which was a similar controversy, and in which a discretionary power of sale might be fairly inferred, the validity of the mortgage is evidently taken for granted, though the question is not discussed in any manner. *Wolfe v. Dorr*⁵ involved a similar controversy, in which it appeared the mortgager had made sales of the goods; but the question of fraud in this respect was not considered,

¹ 40 Me. 561.

⁴ 59 Me. 372 (1871).

² 59 Me. 564.

⁵ 24 Me. 104.

³ 19 Me. 167.

and the few remarks made upon the subject of fraud apply to a supposed fraudulent intent. In *Wheelden v. Wilson*,¹ which was a contest between the mortgagee under such a mortgage and an attaching creditor, the question was not noticed ; still, the mortgage was held fraudulent in intent ; although it was admitted that while “ it may not have been the intention of either the mortgagee or the mortgager to perpetrate a moral fraud,” yet the fact that “ they both intended to place the property mortgaged beyond the reach of legal process, and thereby to delay if not to defeat creditors,” was held to constitute “ a legal fraud.” In the recent case of *Deering v. Cobb*,² the adjudication was upon the subject of the accretions to the stock of goods pending the mortgage. From these cases, it may be inferred that the propriety of such conveyances is no longer questioned in Maine.

In none of these cases is any attention paid to the question of a reserved power of sale by the mortgager, except in *Googins v. Gilmore*, where it is fairly decided, so as to place Maine in the list of those States sustaining the validity of such conveyances. Still it is plain that the question has not been fully considered, and that they are sustained by indirection, not by positive judicial opinion. The decision of such cases, where the fraudulent character and effect of the transaction are urged upon the court, as was done in *Googins v. Gilmore*, will be left to the jury as a question of fraud in fact; which, in the absence of any positive rule to be applied by the court as matter of law, is equivalent to an abdication by the court of all opinion on the subject, in favor of the jury.

KENTUCKY.

§ 98. Reserved power of sale merely a badge of fraud in Kentucky. — One case is presented in Kentucky, involv-

¹ 44 Me. 11.

² 74 Me. 332 (1883).

ing the question, in which the Court of Appeals seems advisedly to have adopted the doctrine that the only effect of such an agreement or reservation is that of a badge of fraud. In *Ross v. Wilson*,¹ a chancery case, the mortgage was on a stock of goods in trade, and by plain implication from the recital that it should cover goods "purchased in the usual course of business," the mortgager was to continue to sell the goods in the ordinary way, as he did do. It was held that the mortgagee acquired no right to the subsequently purchased goods. But neither the circumstance that the mortgager had undertaken to give him such right, nor the discretionary power to sell the goods in the ordinary course of business, was considered to render the transaction fraudulent as to creditors, as had been held by the chancellor below. The court declined to adopt the views of the courts of New York, Illinois, and New Hampshire, thinking the cases from those States not exactly analogous. The mortgagee's acquiescence in the sales by the mortgager was taken as a badge of fraud merely; but the court did "not perceive in it any such evidence of meditated fraud on the part of Seibert, as was requisite to establish the allegation of a sale of his property with the fraudulent intention of hindering and delaying his creditors." From this language it is evident that the court considered the question of fraud in such a conveyance as resting in intent. It appears, also, that no distinction was made between possession alone and possession with power of disposition. The established rule in Kentucky was referred to as applicable to the case, that while absolute sales of personal property not accompanied by possession are fraudulent *per se*,² this rule does not embrace mortgages or deeds of trust, given as security merely, in which class of cases the cir-

¹ 7 Bush, 29 (1869).

² See *Woodrow v. Davis*, 2 B. Mon. 298 (1842); *Jarvis v. Davis*, 14 *Id.* 529 (1854).

cumstance of possession is but a matter of evidence. *Vernon v. Morton*¹ and *Lyons v. Field*² were cited on this point, in which cases, however, there was no discretionary power of sale reserved, and possession alone furnished the evidence of fraud.

§ 99. The question of fraud in conveyances as shown by mere possession not well settled in Kentucky.—The law with regard to fraud in conveyances cannot, however, be said to be settled in Kentucky, even to the satisfaction of the courts. As early as 1838, the Court of Appeals observed that the distinction between absolute and conditional conveyances of chattels, so far as concerned the question of possession, was purely arbitrary and not founded on reason, and that whatever might be the true distinction as to the effect of possession in such cases, it was not “consistent with either sound policy or the harmony of legal science” to hold that possession alone, when retained under an absolute conveyance, would be fraudulent to any greater extent than possession alone would be under a conveyance given merely by way of security.³ This dissatisfaction was re-echoed in the recent case of *Vanmeter v. Estill*,⁴ in which the practice was approved of relieving the rule as to absolute conveyances of its harshness, by establishing in particular cases exceptions to the rule. Accordingly, in that case, where the vendor of personal property had remained in possession, the distinction was taken that the creditor who complained had given credit after the sale of the property and with notice of it, which circumstance relieved the case of all fraud as to him.

Probably no reason can be urged against this decision; and it simply illustrates the power of sound principles of jurisprudence when directed advisedly against musty preced-

¹ 8 Dana, 247.

³ *Daniel v. Morrison*, 6 Dana, 182.

² 17 B. Mon. 543.

⁴ 78 Ky. 456 (1880).

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dents. In truth, there never was any good reason why possession alone should have been regarded, in any jurisdiction, as more than evidence to be considered, by either court or jury, in determining the question of fraud; and there was never any sound reason for a distinction in this respect between absolute and conditional sales. Mere possession, therefore, should always be taken as but a circumstance, and not always a badge of fraud; should be considered by the jury as but a circumstance, under any issues whatsoever that may be presented to them; and should be weighed in like manner by a court upon which may be devolved the duty of finding the facts. But possession coupled with a discretionary power of sale in the grantor has a broader effect, and presents new considerations, and these have led many courts to declare a rule for such cases, far different from that which pertains to cases involving mere possession. In the light of these distinctions, it would be easy to relieve the jurisprudence of any State of all rules on the subject of possession that are merely arbitrary and not founded in sound reason, and to make that jurisprudence illustrative of both "sound policy" and "the harmony of legal science," by adopting the rules announced in *Robinson v. Elliott*, *Blakeslee v. Rossman*, *Collins v. Myers*, and *Lang v. Lee*.

KANSAS.

§ 100. The Kansas view; the question of the fraudulent character of such conveyances one of good faith. — In the case of *Frankhouser v. Ellett*,¹ the Supreme Court of Kansas was, by the opinion of a majority of its three judges, committed to the doctrine that such conveyances are not essentially fraudulent. The case presented was a chattel mortgage upon a stock of goods, the mortgagee continuing in possession, and controlling and disposing of

¹ 22 Kas. 127; 31 Am. Rep. 171.

the goods "with the consent, knowledge, and agreement" of the mortgagee, until the goods remaining on hand were attached at the suit of his creditor. The opinion of the majority of the Supreme Court, after discussing the general characteristics of chattel mortgages, first decides that under the Kansas statutes, the mere retention of possession of mortgaged personal property is not at all invalid, provided the mortgage has been duly filed. As authorities for this proposition, a number of cases are cited from Michigan, Iowa, Massachusetts, and other States, which are authorities no doubt on that subject.

Proceeding then to consider the element of a reserved power of sale and disposition, the opinion discusses the question, in view of the facts, as one of good faith or intentional fraud. The fact of the necessary and inevitable tendency of such an arrangement does not seem to be considered; and so far as the reservations for the benefit of the debtor are concerned, they are deemed to be, in that case at least, as of small importance, and not worth much reflection, in considering the question of good faith, which is, throughout the opinion, the controlling one as to this feature of the case. The following are announced as the conclusions of the court: "We think the rule to be, that where a mortgage is given upon a stock of goods, and by agreement outside the mortgage, the mortgager is permitted to continue business and dispose of the goods in the ordinary way, and use some portion of the proceeds in the support of his family, the transaction will be upheld or condemned, according as it is entered into and carried out in good faith or not. The mortgager, if he may keep the possession, may as well make the sales as a stranger. He acts in that respect as a *quasi* agent, at least, of the mortgagee, and as such agent and salesman is entitled to compensation for his services. Doubtless such arrangements are liable to abuse, and should always be closely scanned; but still they are not absolutely

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and in all cases to be adjudged void as matter of law." And as authorities for these views, the cases previously cited were referred to generally, some of which do indeed involve the same question, but many of which are cases turning on either the question of possession alone, or that of a lien in equity by substitution. Horton, C. J., dissented in a brief but earnest opinion, holding a chattel mortgage with such arrangement engrafted upon it, whether on its face or by outside agreement, to be a mere personal security, a so-called mortgage destroyed in effect by its own provisions, an arrangement not advantageous to the mortgagee, but beneficial to the mortgager and injurious to other creditors, and therefore fraudulent and void; in support of which conclusions numerous authorities were cited. Perhaps by reason of this protest from the chief justice, the reference made to this decision in a later case is such as to be calculated to detract somewhat from its value as an authority.

The case of *Cameron v. Marvin*¹ presented one chattel mortgage on merchandise which on its face allowed the mortgager to continue his regular business, and others without such stipulation, much of the property in which he had also sold. The mortgages were declared void for another reason, and the case was considered and decided with reference to the questions of a pledge of chattels, and a race of diligence between creditors. Counsel had however argued that the mortgages were void by reason of the reserved power of sale in course of business, in reference to which the opinion pronounced by one of the two judges who concurred in the majority opinion in the preceding case, said: "It is at least doubtful whether said mortgages were void merely because the plaintiffs permitted the mortgager to sell some of the mortgaged property;" citing as an authority for this doubt, *Frankhouser v. Ellett*.

¹ 26 Kas. 612.

CHAPTER VI.

THE MINORITY VIEWS FAVORED.

SECTION 101. Such conveyances criticised in Alabama, but questions of fraud left to the jury.

102. The Alabama view as to other frauds in conveyances.
103. The general doctrine in Texas; the fact of fraud established only by proof of intent.
104. Reserved power of sale a fatal feature before a court.
105. Reserved power of sale not conclusive of fraud when before a jury.
106. The Texas views of such conveyances summarized.

ALABAMA.

§ 101. Such conveyances criticised in Alabama, but questions of fraud left to the jury.—The Supreme Court of Alabama, after apparently assenting most cordially to this rule in *Wiswall v. Ticknor*,¹ has subsequently given effect to it in a more qualified manner, surrounding it with certain technical questions; such as, that insolvency of the debtor must intervene to make the transaction fraudulent;² and that the instrument cannot be declared fraudulent upon its face as against creditors, when it does not show upon its face that there are other creditors.³ But the facts calling for the application of the rule are given much consideration (in connection with other circumstances) in *Johnson v. Thweatt*.⁴ In *Price v. Mazange*,⁵ affirming *Constantine v. Twelves*, the court animadverts

¹ 6 Ala. 178.

² *Ticknor v. Wiswall*, 9 Ala. 305; *Constantine v. Twelves*, 29 Ala. 607; *King v. Kenan*, 38 Ala. 63.

³ 29 Ala. at p. 614.

⁴ 18 Ala. 741.

⁵ 31 Ala. 701.

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with just severity upon the vicious features of such transactions among merchants, saying of the one in question that it "has not even the dubious merit of providing that the proceeds of sales to be made by Bostwick shall be paid over to the mortgagee." But the idea advanced in *Johnson v. Thweatt* is, that if the vicious features do not appear on the face of the instrument, the case is to turn upon the question of intent, which must be submitted to the jury. To this class of cases is thus applied the same general rule that in Alabama is allowed to govern all cases of fraud in conveyances, namely, that fraud is a matter resting in intent, and is therefore always to be left to the determination of a jury.

In *Smith v. Leavitts*,¹ the reservation by the grantor under a trust assignment of a stock of goods, of the power of controlling and selling the goods "in the same manner as before the assignment," and his actual control of the property accordingly, were said to "clearly establish the want of good faith in this entire transaction, and show that the assignment was a device to defraud creditors, and through that medium to give the debtor the control and enjoyment of his property." But these necessary inferences from the facts, it was held the jury could alone draw, "as they alone could determine the existence of the facts."

§ 102. The Alabama view as to other frauds in conveyances.—It was said in one early case that "fraud is a question of law when the facts are ascertained;"² and in another, a reservation by the assignor under an assignment for the benefit of creditors, for the support of himself and family, was held to render the assignment fraudulent and void as to creditors; and it was said that where "the conclusion of fraud naturally flows from the facts of the case, the court is clearly competent, and is bound to pronounce

¹ 10 Ala. 92.

² *Ayres v. Moore*, 2 Stew. 336 (1830).

the deed fraudulent and void."¹ But in a later case, the question of fraud, as shown by a reservation to the benefit of the mortgager under a mortgage, was treated as a question purely of fraudulent intent.²

In *Wiley v. Knight*,³ where, under a mortgage upon farming stock, implements, crops and provisions, the mortgager retained the possession and the use of the property, part of it being consumable in the use, this was held to render the mortgage fraudulent and void as to other creditors, entirely irrespective of the intent of the parties. But in the later case of *Reynolds v. Welch*,⁴ this was held to be an adjudication as to constructive fraud only; and it was said, "there can be no actual fraud without intention." And in other earlier cases of conveyances similar to that in *Wiley v. Knight*, involving farming property consumable in the use, it was held that this circumstance did not avoid the conveyance *per se*, because the use and consumption of the provisions and produce on the farm might assist in producing additional assets by the cultivation of the land.⁵

TEXAS.

§ 103. The general doctrine in Texas ; the fact of fraud established only by proof of intent. — The attitude of the Supreme Court of Texas toward this question is peculiar. The doctrine of *Robinson v. Elliott* was expressly adopted in *Peiser v. Peticolas*.⁶ Previous to this, it was the general practice in this State to treat all cases of fraud in conveyances as turning upon intent, and as presenting questions for the jury, and not for the court, whose duty it was to explain the nature and character of fraud to the jury.⁷

¹ *Richards v. Hazzard*, 1 *Stew. & P.* 139 (1831).

² *Reynolds v. Welch*, 47 *Ala.* 200 (1872).

³ 27 *Ala.* 336.

⁴ 47 *Ala.* 200.

⁵ *Ravvisies v. Alston*, 5 *Ala.* 297; *Elmes v. Sutherland*, 7 *Ala.* 262.

⁶ 50 *Tex.* 638; 32 *Am. Rep.* 621 (1879).

⁷ *Howerton v. Holt*, 23 *Tex.* 51; *Green v. Banks*, 24 *Id.* 508.

“The greatest means of control which courts have in relation to this subject, are to be found in their power of granting a new trial, if the verdict should not properly respond to the facts of the case.”¹ So, where the Supreme Court was satisfied, from an examination of the facts of the case, that a general assignment “was made in fraud of creditors, and should certainly have been so found by the jury,” a new trial was granted for this reason; the court applying principles of equity in considering the case in this manner.² And in another case, heard at the same term, and involving the same general assignment, it was said that “a court of equity, having a right to find the facts from the evidence, might well infer, from these established and patent facts, the additional and important fact of fraudulent intent; and having thus found it, declare the legal consequence, by setting aside the deed as void, just the same as though the fraudulent intent was confessed in the petition.” But this power of ordinary courts of equity, of finding a material fact, was disavowed as not pertaining to the courts of Texas, in causes involving principles of equity, any more than in those involving questions of law.³ The same principle was applied in a later case, where the evidence which might have sustained a jury in declaring fraud was considered insufficient to authorize the court in so doing; for while the court undoubtedly had power to declare a conveyance fraudulent, it was a power to be exercised with great caution, and only in a very clear case.⁴ To this extent had the action of the courts in reference to fraud in conveyances been embarrassed by this question of procedure, considered in the supposition that fraud can never be shown as a matter of fact except by proof of intent.

¹ *Howerton v. Holt, supra*, at p. 62.

² *Carlton v. Baldwin*, 22 Tex. 724.

³ *Baldwin v. Peet*, 22 *Id.* 708.

⁴ *Bailey v. Mills*, 27 *Id.* 434.

§ 104. Reserved power of sale a fatal feature before a court. — *Peiser v. Peticolas*¹ presented the question of a discretionary power of sale under a mortgage upon a stock of goods, not appearing upon the face of the instrument, but shown clearly by the facts in evidence. The case being tried by the court without the intervention of a jury, the mortgage was held valid. Upon appeal, the Supreme Court considered the question presented as one of legal fraud. The practice above referred to of leaving all such questions to the jury was not now an obstacle in the way of the court; nor was it embarrassed, as was another court in *Cheatham v. Hawkins*,² by the fear that the trial judge as a court might have erred in instructing himself as a jury. It was adopted as a legal conclusion, that a discretionary power of sale under such a mortgage is inconsistent with its true purposes, is a reservation for the use and the benefit of the debtor, and makes the instrument a mere expression of confidence; and the fraud in such a case is characterized as “well-defined legal fraud.” *Robinson v. Elliott* and *Collins v. Myers* were cited with express approval; and it was said that this principle of law “should be declared by the court, if the intent and purpose of the parties to make such a mortgage are manifest from the terms of the instrument itself, or by the jury if not so manifest, but clearly shown by uncontradicted testimony; the principle is the same, the only difference being as to the character of the evidence and the mode by which it is established.”³ The judgment below was reversed, and it was said the verdict of the jury to the same effect as that judgment should have been set aside.

This doctrine was reaffirmed in *Crow v. Bank*,⁴ by the court; but that case was distinguished by the circumstance that the evidence tended to prove that the sales made of the goods by the mortgagors were made as agents of the mort-

¹ 50 Tex. 638.

³ 50 Tex. at p. 639.

² 76 N. C. 335.

⁴ 52 *Id.* 362.

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gagees, and the proceeds were applied to their debt; in view of which the transaction was sustained as valid.

§ 105. Reserved power of sale not conclusive of fraud when before a jury. — But in *Scott v. Alford*,¹ where the case was presented to a jury, quite a different view was taken of the functions of the court. The conveyance in this case was a deed of trust upon a stock of goods in trade, with an express recognition on its face of the power of sale by the grantors in the conduct of their business. The verdict having been in favor of the conveyance, the case was considered by the appellate court in reference to a request to the trial court to charge the jury that the feature of the deed above mentioned made it fraudulent and void. This, it was held, was correctly refused. There would be no legal deduction of fraud in such a conveyance. The feature referred to was an obvious badge of fraud, and it may be would have justified the jury, or even have required them to return a verdict of fraud, but it would not warrant a conclusive deduction of fraud by the court, and therefore there was no error in declining the instruction asked. *Peiser v. Peticolas* was not in express terms overruled, but it was distinguished. The court was in both cases composed of the same members, but the opinions were rendered by different judges, though without dissent in either case. The distinction taken as to *Peiser v. Peticolas* was, that it was tried by a court exercising the blended functions of court and jury, so that it could only be in a case where no jury should intervene, that such a conveyance would present a case of "well defined legal fraud." So upon these slight distinctions, that the instruction asked, as to which error was assigned, was itself technically erroneous, and that no complaint was made as to the instructions actually given, or to the finding of the jury on the evidence submitted to them,

¹ 53 Tex. 82 (1880).

the verdict in *Scott v. Alford*, in favor of the validity of the conveyance, was sustained.

§ 106. The Texas views of such conveyances summarized. Recent legislation on the subject.—The result from these cases may be summed up as follows: If a mortgage, with a discretionary power of sale reserved to the mortgager, be presented to a court without a jury, it will be declared fraudulent as a matter of law. But if presented to a jury, the question of fraud must be submitted to them, and their verdict will determine the question, subject to the power of the Supreme Court to set that verdict aside. If *Peiser v. Peticolas* be followed, a verdict for the conveyance would not be sustained in any case involving a discretionary power of sale. But if *Scott v. Alford* be followed, the verdict would be sustained; unless, as intimated in that case, it should satisfactorily appear to the court that “the possession and power of disposition was unreasonable and inconsistent with the *bona fide* security of a debt already past due, and a delay and hindrance of the creditors;” for which aspect of such a case, *Peiser v. Peticolas* was recognized as an authority.¹

All these cases arose prior to the passage of an act on this subject by the Legislature, in 1879, which went into effect in July of that year, and which is calculated to relieve the courts of the necessity of making so fine distinctions. It provides as follows: “Every mortgage, deed of trust, or other form of lien, attempted to be given by the owner of any stock of goods, wares or merchandise daily exposed to sale in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of possession of said goods, and control of said business by sale of said goods by said owner, shall be deemed fraudulent and void.”²

¹ 53 Tex. at p. 95.

² Act to regulate assignments for benefit of creditors, Gen. Laws, 1879, ch. 53, sect. 17.

CHAPTER VII.

THE QUESTION NOT A VITAL ONE IN SOME JURISDICTIONS.

SECTION 107. Rhode Island; the question not considered.

108. Maryland; the question not discussed.

109. New Jersey; general rules respecting fraud in conveyances.

110. Vermont; the question not a practical one.

111. Georgia; the question eliminated by statute.

112. California and Nevada; mortgages of chattels limited by statute.

113. Louisiana; mortgages of chattels unknown.

§ 107. **Rhode Island ; the question not considered.** — The question of the fraudulent character of a reserved power of sale in this class of cases has not addressed itself to the attention of the Supreme Court of Rhode Island. Three cases were presented to that court in 1877, in which it was fairly involved, but was not considered. *Williams v. Briggs*¹ was a case of a mortgage on the tools, fixtures, and stock in trade of a carriage manufactory, under which the grantor continued to conduct business on his own account for five years ; after which he made a voluntary assignment for the benefit of his creditors generally. The controversy was between the mortgagee and the general assignee, over the claim of the former to hold the property acquired by the mortgager pending the mortgage, which was the larger portion of that on hand at the time of the assignment. The case was considered solely as presenting the question of substituted lien. The court said : “ The case raises the question whether a mortgage of property to

¹ 11 R. I. 476.

be subsequently acquired conveys to the mortgagee a title to such property when acquired, which is valid at law *as against the mortgager or his voluntary assignee.*" The action being trover, by the administrator of the mortgagee, for the conversion of the after-acquired goods, the court held that the mortgagee had no legal title in them, and that he could not recover their value in trover. *Cook v. Corthell*¹ was a case of a mortgage on a trader's stock of goods, the grantor remaining in possession, and conducting business for more than a year, after which the mortgagee took possession. The suit was attachment of the goods by a creditor of the mortgager. The questions considered, both by the majority of the court and the dissenting judge, related to the rights of the mortgagee under his possession. *Williams v. Briggs* was referred to as an analogous case. In neither of these cases was the character of the transaction, in view of the mortgager's retained possession and power of disposition, argued by counsel or considered by the court.

The plaintiff in *Williams v. Briggs*, having failed in his action at law, filed his bill in equity to enforce the equitable lien which he claimed under the mortgage, upon the after-acquired property, and this case was presented as *Williams v. Winsor*.² The lien, which was of no force at law, was considered valid in equity, and the plaintiff now prevailed. This case has been cited as placing Rhode Island in the same category with Iowa and Michigan, on the subject of the fraudulent character of such conveyances. It will be seen, however, upon examination, to be confined to the question of lien by substitution. Counsel for respondents submitted simply the following proposition on the subject of fraud: "The provision in this mortgage relating to after-acquired property does not belong to the

¹ 11 R. I. 482; 23 Am. Rep. 518.

² 12 R. I. 9.

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class of contracts of which an equity court will decree a specific performance, because such a transaction is against public policy, throwing open a wide door to possible fraud." In response to which suggestion the court said: "While in some States a mortgage containing *a power to sell and replace*, or where the mortgager retains possession, has been held to be therefore void, such has not been the doctrine of the courts in this State. Here, the question whether such a mortgage is fraudulent or not is a fact for the decision of the jury, upon the circumstances and evidence in the particular case." So far, then, as the question of fraud was considered at all by the court in this case, it was considered, like the whole case, as turning upon a covenant *to sell and replace*. The reporter of the court, in a note,¹ refers to comments upon this case in the Albany *Law Journal*,² in which the same view is taken of the case, viz.: as presenting the questions of power to mortgage property *in futuro*, and of a lien by substitution. It can scarcely be supposed that the court, in the language above quoted, intended to deny the power of a court of equity to pass upon such a question of fraud for itself, upon independent examination of the facts, or to say that an issue of fact must of necessity be sent to a jury in every such case. It may seem plainly inferable from the attitude of the Supreme Court toward such questions that Rhode Island will in time adopt the view that such conveyances are not inherently fraudulent; but it is plain, also, that the question has not yet been fully considered.

§ 108. Maryland; the question not discussed. — The question has not been considered by the Court of Appeals of Maryland, though opportunities have been afforded. *Hudson v. Warner*³ was a contest in equity between the mortgagees under a mortgage of a stock of goods in trade,

¹ 12 R. I. at p. 13.

² 17 A. L. J. 859.

³ 2 Har. & Gill, 415 (1828).

and subsequent purchasers from the mortgagors, each party claiming to have received delivery of the property. The case was determined upon the question of notice to the later claimant of the earlier conveyance. The possession of the mortgagors for two years was not considered otherwise than as a question of possession alone; and this was held to be consistent with the deed, on the authority of *Bucknall v. Roiston*.¹ *Hamilton v. Rogers*² involved a mortgage on a stock of goods in trade, given by one Worley, covering also "all renewals of and substitutions for the same or any part or parts thereof," the professed object being "to include not only the articles at present in said stores, but whatever may be at any time therein, in the course of said Worley's business." The case was considered by the Court of Appeals solely with reference to the mortgagee's right to the after-acquired goods; and the action being trespass, it was adjudged that he had no such right as to sustain an action at law. The same principle was again applied in *Rose v. Bevan*,³ which was a suit in equity involving a similar mortgage. But in *Butler v. Rahm*,⁴ it was held that such a conveyance creates a valid lien in equity as to after-acquired goods; this, however, was the exceptional case of a railroad mortgage and accretions thereunder. In neither *Hamilton v. Rogers* nor *Rose v. Bevan* was the question of fraud, as arising from the mortgagor's retention of the power of sale and disposition, discussed or considered.

Mortgages on stocks of goods in trade are of occasional occurrence in Maryland. *Tricbert v. Burgess*⁵ was an equity case, involving a parol agreement to give such a mortgage, of which jurisdiction was taken; but as the case was *inter partes*, the question above referred to could not

¹ *Prec. in Chan.* 285.

⁴ *46 Id.* 541.

² *8 Md.* 301.

⁵ *11 Id.* 452.

³ *10 Id.* 466.

arise. *Preston v. Leighton*¹ was a contest between two successive mortgagees of a stock of goods, the earlier mortgage being sustained; and the question of power of sale by the mortgager was not discussed otherwise than to refer to the fact that no agreement had been made to allow such a power.

The case of *Price v. Pitzer*² indicates a disposition to regard the doctrine of *Robinson v. Elliott* with favor. A trader conveyed all his stock in trade, with other property, to trustees, for the ostensible benefit of creditors, but reserved the right to carry on his business, paying to the trustees a portion of the proceeds. The Court of Appeals held the deed fraudulent and void, characterizing it as follows: “The practical arrangement contemplated by the provisions of the deed is, by virtue of its authority, to enable Bloomenour to continue his business of merchandising, without interference on the part of his creditors, until the debts are all paid in the manner indicated by him in the deed. If a bold scheme like this, to hinder and delay his creditors, and to make their rights of enforcing payment of their claims subordinate to the mode and process of payment provided by the debtor and grantor in the deed, is not in palpable and unquestionable violation of the provisions of the statute of Elizabeth, and absolutely void as to his creditors, it is difficult to define what would be.”

§ 109. New Jersey; general rules respecting fraud in conveyances. — No decisions on the subject are found in the reports of the State of New Jersey, and apparently a contest has never been made there over the validity of a mortgage of goods in trade with a power of disposition reserved. A *dictum* in the case of *Miller ads. Pancoast*³ has sometimes been taken as evidence of an inclination of the Supreme Court toward the doctrine that such a reservation

¹ 6 Md. 88.

² 44 *Id.* 521 (1875).

³ 29 N. J. Law, 5 Dutch, 250 (1861).

would merely furnish evidence of fraud to go to a jury. It is doubtful, however, if the court intended to express any view on the subject in reference to the legal effect of such a transaction upon the rights of creditors; the language of the opinion is limited to the question of the rights of purchasers. The case presented was a mortgage of chattels, with a reservation to the mortgager of possession only; the element of a reserved power of disposition did not appear; nor is it stated that the chattels were merchandise. The Supreme Court being appealed to, for advice to the inferior courts as to the validity of the conveyance, it was held that in all such cases, whether the reservation of possession be fraudulent or not "is a question of intent to be settled as a question of fact by a jury." After thus deciding the case, the court further expressed its opinion as to other questions which might possibly arise in reference to fraudulent conveyances, as follows:—

"Although the mortgage may not be invalid against creditors or subsequent purchasers for want of possession in the mortgagee, it by no means follows that it may not be void against subsequent purchasers by reason of the mortgagees suffering the mortgager to use and manage the mortgaged chattels in such a way as to deceive *bona fide* purchasers as to the right of the mortgager to sell and dispose of the chattels; as in case of the stock of a merchant or manufacturer, if the mortgagee of such a stock should permit the mortgager to remain in possession, selling and disposing of his stock without restriction in the ordinary course of trade, such conduct would be evidence of fraud to go to a jury, evidence that the mortgage was kept on foot for fraudulent purposes; and the mortgage would be held void, at least so far as property sold in the ordinary course of the trade permitted, was concerned." This is a statement of the results of the familiar doctrine of estoppel, by which the mouth of the mortgagee would be closed against any complaint concerning sales to

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bona fide purchasers. Such sales would clearly pass the title to the goods, even as against the mortgagee; and cases applying the rule to such sales are numerous, both in England¹ and America. It by no means follows, from the proposition that the question of fraud as to purchasers must go to a jury, that the courts of New Jersey would be debarred from applying a legal rule to the question of fraud as to creditors, when the facts are plain and undisputed.

The previous course of adjudication in this State does not appear to furnish any rule for this particular class of cases, should one arise. The general rule is that “questions of fraud, being mixed questions, partly of law and partly of fact, must always be determined by the jury and not by the judges.”² But “what is evidence of fraud, is a question of law;”³ and if a jury fails to find fraud when the evidence warrants it, their verdict will be set aside as a verdict against law.⁴ It is for the jury merely to find the facts, and the law will pronounce its judgment on the transaction.⁵ And in the courts of equity, “the existence of fraud is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted;”⁶ which is the principle that makes a voluntary settlement on a wife by an embarrassed husband, “fraudulent as against creditors, no matter how pure the motive which induced it.”⁷

*Looker v. Peckwell*⁸ is inconclusive. It was a mortgage on a stock of goods in trade, with an implied power of sale in

¹ See *ante*, sect. 31.

² *Cliver v. Applegate*, 5 N. J. Law, 2 South. 479; *Hendricks v. Mount*, *Id.* 738.

³ *Vanpelt v. Veghte*, 14 *Id.*, 2 Green, 207.

⁴ *Cliver v. Applegate*, *supra* (1819).

⁵ *Watkins v. Pintard*, 1 N. J. Law, Coxe, 378.

⁶ *Belford v. Crane*, 16 N. J. Eq. 265 (1863).

⁷ *Id.* p. 270.

⁸ 38 N. J. Law, 9 Vroom, 253 (1876).

the usual course of business ; but the mortgage was not attacked on this ground, and the only controversy was over twenty barrels of flour, newly purchased by the mortgager, which was levied on at the instance of a creditor ; and it was held that the newly acquired goods did not pass under the lien of the mortgage.

§ 110. Vermont ; the question not a practical one. — The rule of law in Vermont on the subject of retention of possession is so broad as to offer no opportunity for distinctions between possession with and possession without power of sale. It is well settled in that State, as a matter of public policy, that all transfers of personal property, whether by sale, pledge, or mortgage, must be accompanied by a manifest and substantial change of possession, or they will be voidable at the suit of other creditors of the grantor.¹ This rule is explained to be a peculiar doctrine of constructive fraud ; “ it adopts a particular mode of determining the existence of the vitiating fraud in the given case ; in a sense, it propounds a kind of rule of evidence, prescribing what facts proved shall be held to show the existence of such fraud ; ” it is “ a kind of conclusive estoppel *in pais*. ”² It differs, therefore, from ordinary presumptive fraud only in this, that the presumption is conclusive.

§ 111. Georgia ; the question eliminated by statute. — The jurisprudence of Georgia is in a peculiar condition as to this question. The Legislature of this State has gone so far as to legalize “ mortgages ” of stocks of goods in trade, by a statute which provides that “ a mortgage may cover a stock of goods, or other things, in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgager up to the time of foreclosure,

¹ *Farnsworth v. Shepard*, 6 Vt. 521 (1834); *Houston v. Howard*, 39 Vt. 54 (1866); *Weeks v. Prescott*, 53 Vt. 57 (1880).

² *Daniels v. Nelson*, 41 Vt. 161.

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and attaches on the purchases made to supply their place.”¹ This statutory provision has been several times sustained by the Supreme Court.² Thus is realized the very idea of “a floating mortgage, which attaches, swells and contracts, as the stock in trade changes, increases or diminishes,” which has in other jurisdictions been characterized as vicious.³ But this floating lien is not allowed by the Supreme Court to extend to any such portion of the stock, when seized for foreclosure, as may be in excess of the amount of the stock on hand at the time the mortgage was given. To allow the mortgage as a lien on any greater amount of goods would be, in the opinion of the court, to “open the door to unlimited fraud.”⁴ This shows that the judicial mind in Georgia is not wholly insensible to the difficulties attending such conveyances. The same fact appears in a later case, in which this ruling is adhered to. “The permission to give such a mortgage, though a very convenient privilege, is one very easily used to commit fraud; and we think the spirit of the code, as well as public policy, requires it to be limited as we have limited it. We have known of several cases where mortgages of this character have been given, with a small stock at the time, and large purchases made on credit soon afterwards. The temptation to do this, if possible, would lead to fraud, and we think the object of the law is best attained by keeping the parties within the amount of stock on hand at the time.”⁵ This recognition of the tendency of such transactions may perhaps indicate the common-law view which would be entertained in Georgia if the courts were at liberty to apply it. In general, in this State, a reservation

¹ Code of Georgia, 1873, sect. 1954.

² *Chisolm v. Chittenden*, 45 Ga. 213; *Anderson v. Howard*, 49 Ga. 313; *Goodrich v. Williams*, 50 Ga. 425.

³ *Collins v. Myers*, 16 Ohio, 547.

⁴ *Chisolm v. Chittenden*, 45 Ga., at p. 219.

⁵ *Goodrich v. Williams*, 50 Ga., at p. 435.

of any kind, for the benefit of the debtor, at the time he makes a conveyance, destroys its validity as to creditors.¹ Courts are not, however, called upon to instruct juries as to badges of fraud in such cases, or their effect, unless especially requested.²

It results that so far as the jurisprudence of Georgia fails to recognize the reservation by a mortgager of the power of selling the goods mortgaged at his discretion, as a reservation to his use, it is due to the action of the Legislature rather than to the rulings of the courts, and that the Georgia cases fall far short of being authorities upon the common-law question.

§ 112. California and Nevada; mortgages of chattels limited by statute. — The question under discussion cannot arise in California, all controversy over it being eliminated from the jurisprudence of that State by the adoption of peculiar statutory provisions concerning mortgages of personal property. The character of goods which may be made the subject of such a mortgage is indicated in express terms. Twelve classes of chattels are named, in none of which could a stock of merchandise in trade, or other property which must be sold or consumed to be used, be included.³ The possession of mortgaged chattels is regulated in detail by statute. These statutes undoubtedly prevent much vexatious litigation. They are to be commended as prudent applications in the advance of the principles of the wholesome common-law rule which, as has been seen, is adopted so generally by the American courts. Prior to these statutes, it was held in California, under the provisions of the law then in force, that retention of possession

¹ *Edwards v. Stinson*, 59 Ga. 443; *Mitchell v. Stetson*, 64 Ga. 442.

² *Nicol v. Crittenden*, 55 Ga. 497, head-notes 10 and 11.

³ Civil Code of Cal., sect. 2955; Codes and Statutes, sect. 7955; amendment of 1878, 8 Hittell's Codes, p. 239.

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by a mortgager of chattels would be conclusively fraudulent as to creditors, and that a stipulation for such retention of possession would have that effect, although the mortgagee actually took possession, for it would be a possession in violation of the stipulation in the mortgage.¹

A similar result is attained in Nevada, as to the class of cases under consideration, by the statute which invalidates all mortgages of personal property, unless possession be delivered to and retained by the mortgagee; the single exception being made of growing crops, mortgages of which are to be acknowledged and recorded.²

§ 113. Louisiana; mortgages of chattels unknown. — Chattel mortgages are unknown to the law of Louisiana. Movables are not susceptible of being mortgaged. Even if made in another State, and valid there, a chattel mortgage would not be recognized in that State.³ The question will not, therefore, be likely to be presented to the courts of that State.

In the other States not referred to by name, the question seems never to have fairly arisen for consideration in the courts of last resort.

¹ *Meyer v. Gorham*, 5 Cal. 322 (1855).

² Compiled Laws of Nevada, 1873, sect. 294; (ch. 26, sect. 66).

³ *Delop v. Windsor*, 26 La. An. 185 (1874).

CHAPTER VIII.

CRITICISMS UPON THE DOCTRINE EXAMINED.

- SECTION 114. Summary of the views of the American courts.
- 115. Objections to the majority doctrine stated.
- 116. Is the doctrine one of constructive or presumptive fraud?
- 117. Constructive and presumptive fraud considered.
- 118. Fraud as a question of law.
- 119. Distinction between actual fraud and fraudulent intent.
- 120. The law and the facts in cases of alleged fraud.
- 121. Fraud predicated of the transaction itself, rather than of the motives of the parties.
- 122. The courts test such mortgages by their characteristics.
- 123. Registration does not validate a fraudulent transaction.
- 124. The policy of allowing such transactions considered.
- 125. Arguments in favor of such a policy answered.
- 126. Defective views of the subject illustrated.
- 127. Characteristics of a chattel mortgage.
- 128. Effect of a power of sale reserved to the mortgager.
- 129. Reasons for the existence of the doctrine.
- 130. Testimony of negative witnesses.
- 131. Testimony of affirmative witnesses.
- 132. Testimony of other observers.

§ 114. **Summary of the views of the American courts.**—From this review of the cases decided in the courts of the various States, it will appear that in the large majority of those where the question has been considered, the result is an adjudication that a mortgage of chattels with such a reserved power of sale in the mortgager is positively fraudulent, and may be avoided at the suit of a creditor. This doctrine has been advisedly adopted in fourteen States;¹

¹ Virginia, New York, New Hampshire, Ohio, Minnesota, Wisconsin, Illinois, Missouri, Tennessee, Mississippi, Colorado, Oregon, West Virginia and Indiana.

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and is received with favor in several others. It is further adopted as a rule of law in Nebraska to this limited extent, that it will be applied by the courts where the power of sale is reserved to the mortgager on the face of the instrument, but cases where the power does not so appear will turn upon the question of a fraudulent intent, and must be submitted to a jury. In North Carolina the doctrine is strongly favored, but is applied only as a matter of presumptive evidence, juries being recommended, if not required, to reach the conclusion that such transactions are fraudulent, through a process of presumptions.

A contrary view is entertained in eight States, where for various reasons it has been held that jurisprudence has no substantive rule on the subject.

In Michigan, fraud in this class of cases is to be considered only as resting in intent, and thus as presenting an issue of fact in all cases. This arbitrary classification is adopted in deference to a statute which makes fraudulent intent a question of fact for the jury; which statute is not, however, in other cases allowed to "turn principles of law into questions of fact."¹ In Iowa, fraud in such cases is in like manner left to the jury as a question of fact; but this is in deference to a statute which provides that the mere retention of possession under a chattel mortgage does not invalidate the mortgage, provided it is acknowledged and recorded; to which acts the statute ascribes a legal effect equivalent to actual manual delivery.

In Massachusetts, fraud in such cases always turns upon the question of fraudulent intent, proof of a reserved power of sale furnishing only presumptive evidence for the jury; although in other cases of reservations by the grantor, such as a power of revocation, or the use of property consumable in the use, intent is immaterial, and the law pronounces its judgment of fraud.

¹ *Pierson v. Manning*, 2 Mich. 445.

In Maine, in like manner, the case furnishes presumptions only, which are to go to the jury in illustration of the question of fraud in fact, by which is meant fraud resting in intent; and the courts have practically no opinion on the subject of the fraud in these cases. In Kentucky, the reserved power of sale is treated as only a badge of fraud, to be considered by the jury in connection with the question of intent.¹ In this State as well as in Maine, no distinction seems to be observed between retained possession alone, and possession with a reserved power of disposition. Perhaps the rule is to be considered as not well settled either way in Kentucky, in view of the fact that the old distinction between absolute and conditional transfers, as to the inherently fraudulent character of retained possession alone, is considered to be inconsistent with "the harmony of legal science."¹

In Kansas, the rule is adopted that the question of fraud in the reservation of a discretionary power of sale is a question of good faith or of intent to defraud; but this rule was announced by a divided court, in but one case, the decision in which has since been considered of doubtful propriety. In Alabama, it is thought that such transactions have a bad appearance, but it must be left to the jury to condemn them, because there is in this State "no actual fraud without intent." In Texas, heretofore, if the mortgage bore the reservation of a power of sale on its face, and was presented to a court alone, it would be declared fraudulent *per se*; though if presented to a jury, the question of fraud would be left to them, subject to review by the court, and probably it would be the duty of the jury to find such a reservation fraudulent; but all these distinctions are now abolished by a statute which declares all such transactions fraudulent.

¹ *Daniel v. Morrison*, 6 Dana, 182.

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§ 115. **Objections to the majority doctrine stated.**— The dissenting views, which find support in the adjudications of the eight States above named, have been pressed upon the consideration of the courts with persistency, and have been supported by ingenious arguments. A recent treatise presents an elaborate discussion of the question, from which the following conclusions are there deduced: First, that “the doctrine of absolute fraud arising in a mortgage of merchandise from the mortgager’s retaining possession with a power of disposal in the usual course of trade * * * is contrary to sound principles of jurisprudence;” second, that “it is contrary to sound policy;” and third, that “it has no reason for its existence, derived from general observation and experience.”¹ This concise statement summarizes the objections urged to the doctrine of *Robinson v. Elliott*, and furnishes a view upon which the decisions in the eight dissenting States may be harmonized. It is a view no doubt entertained, in the terms stated, in some of those States; and it would perhaps be favored in some other States where the question has not been directly passed upon.

If these views are correct, it is of prime importance to the profession that they be so understood, and be generally adopted. The concurrence of the adjudications of the courts of fourteen of the States with those of the United States, if at war with established principles of jurisprudence, should not be allowed to have influence or weight outside those courts; but if erroneous, their errors should be fearlessly exposed, and by legislation or otherwise, corrected. It is proper, therefore, to examine upon reason and principle the objections presented.

§ 116. **Is the doctrine one of constructive or presumptive fraud?**—First, it is supposed that the doctrine of *Robinson v. Elliott*, *Collins v. Myers* and kindred cases is

¹ Jones on Chattel Mortgages, sect. 425.

“contrary to sound principles of jurisprudence.” This view it is endeavored to substantiate, by an explanation of the characteristics of constructive or presumptive fraud, which terms have commonly, though perhaps erroneously, been used as synonymous. But here is a fundamental error. The doctrine of *Robinson v. Elliott* cannot be properly understood or explained by reference to or an explanation of constructive fraud, nor is it in reality a doctrine of presumptive evidence. It may be suggested in advance that this error is responsible for the greater part of the dissent from that doctrine.

In *Brett v. Carter*,¹ frauds of the class under discussion are spoken of as “constructive or artificial frauds.” The objection to the doctrine has been urged that “facts not appearing upon the face of the instrument are presumed, in order to *help out this presumption of fraud.*”² In *Gay v. Bidwell*,³ it was asked, “How can any one, from the face of this mortgage, and without reference to extraneous facts, draw any conclusion whatever, concerning either its intent, or its bearing upon creditors. It would certainly be valid under any circumstances, if there were no creditors. It does not appear from the mortgage that there were any. It would not injure other creditors if they were abundantly secured. It does not show they were not. It would not be void if they had authorized it. And many other cases might be suggested, showing that, without proof of external facts, there could be no conclusive presumption at all.” The dissenting opinion in *Griswold v. Sheldon*⁴ may be referred to for a full discussion of the question as one of presumptive evidence of fraud.

§ 117. Constructive and presumptive fraud considered. — These various criticisms furnish illustrations of

¹ 2 Lowell, 458.

³ 7 Mich. 519.

² Jones on *Chatt. Mort.* sect. 419.

⁴ 4 N. Y. 581.

the practice of setting up a man of straw in order to strike him down. Frauds of the class in question are not supposed, by those who expose and condemn them, to be constructive, artificial or presumptive frauds. The courts, in declaring the fraud in such cases, do not proceed upon any theory of either construction or presumption. In *Robinson v. Elliott* and analogous cases, the fraud is neither presumed nor inferred; it is discovered to exist, it is exposed, and it is then adjudged. The fraud thus adjudged is said to be actual.

Mr. Bigelow says, in his work on Fraud, “Constructive or presumptive fraud is an inference of law, not to the effect that an actual fraud has, in the absence of explanation, been clearly proved, but either that it is *probable* that fraud was committed, or that the existence of certain things in the relation or conduct of parties begets a probability of actual knowledge of fraud, or what will lead to fraud, on the part of the person complained of. The fraud thus fixed is presumptive only, and in reality may not have existed.”¹ This is one of the latest of many definitions, in which no difference is observed between constructive fraud and presumptive fraud, the expressions being used interchangeably. The terms there employed are apt to describe fraud which is proved by a resort to presumptive evidence. There is a constructive fraud which is adjudged by an arbitrary process of jurisprudence, in cases where the relations between parties are so intimate that, for reasons of public policy, no explanation or proof of good faith would be allowed to validate the transaction *inter partes*; and in these cases, it is scarcely exact to style the fraud presumptive. But without entering into these distinctions, and using the terms “constructive” and “presumptive” for the present as interchangeable, it suffices

¹ *Bigelow on Fraud*, lviii.

to say that the fraud in the class of cases under consideration does not fall within the definition cited. It is rather of the class referred to by the same author elsewhere, in these words : “ In some cases, fraud is *self-evident*; and when so, it is the proper province of the court to *adjudge upon it.*”¹ Any criticism in the premises, based on considerations applicable to presumptive fraud or constructive fraud must, therefore, in the nature of the case, be misleading.

§ 118. **Fraud as a question of law.** — It is frequently supposed that the term “ fraud in law,” and the term “ constructive or presumptive fraud,” are equivalent expressions; and that the terms “ fraud in fact” and “ actual fraud” are also synonymous. This use of terms distinguishes the dissent from the doctrine in question, both in the opinions of the dissenting courts and the arguments of the dissenting controversialists. It is based on the supposition that “ actual fraud” always implies a *fraudulent intent* on the part of the person complained of, or, in other words, that there can be no “ actual” fraud *without* such an intent; and further, that as such intent is always a question of fact to be determined by a jury, therefore, “ actual fraud” is always a question for a jury. Hence it is reasoned that “ actual fraud” is never, and can never be, the equivalent of “ fraud in law,” but that the latter is always the equivalent of “ presumptive fraud.” It follows from these views, by easy transition, in regular logical processes, that whenever a court, without the aid of a jury, has adjudicated that fraud exists, it can be no other than “ presumptive or constructive fraud.” These ideas colored the views of the court in *Brett v. Carter*,² where it was “ supposed to be well settled” that, in the class of cases under consideration, “ the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause in the

¹ *Big. on Fraud*, p. 468.

² *2 Low.* 458.

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bankrupt law of England ;" and where it was thought " strange that after our Legislatures have met the difficulties of Twyne's Case, by requiring registration," and providing that " fraud shall be a question of fact for the jury," the Supreme Court of the United States and other courts should hold such transactions to be fraudulent and void in law. So it has been thought that " an arbitrary rule, declaring void all mortgages of personal property containing provisions that the mortgager may retain possession and sell in the usual course of business, must have the effect of nulling very many transactions which are without fraud in fact."¹ Those courts, therefore, which adopt this rule, have, in so doing, " revived the old rejected doctrine of constructive fraud ;" while those which dissent from it " have adhered to the safe and just rule that fraudulent intent is in all cases a question of fact."²

§ 119. Distinction between actual fraud and fraudulent intent. — The difficulty in all of these views of such transactions arises from a misconception of the nature and character of fraud as a legal question. The classification of fraud into " fraud in law " and " fraud in fact " is not a happy one. The classification into " actual fraud " and " constructive fraud " is logical and explicable. But " actual fraud " and " fraudulent intent " are far from synonymous, and he who fails to distinguish between them will err. The term " fraud " has prime reference, not to the intent or motive of the party to the transaction, but to the inherent characteristics and quality of the transaction itself. If essentially unreal or deceptive, it has in itself fraudulent features, and may be characterized as a fraud; but the " intent to defraud," that is, the intent to give the transaction a deceptive character, in order thereby to accomplish deception, may or may not have been present. " Actual

¹ Jones on Chat. Mort., sect. 418.

² *Id.*, sect. 415.

"fraud" means that which actually exists, whether determined by a court or found by a jury; and it may frequently be, and often is, found to exist in the absence of fraudulent intent. Wherever the intent to defraud becomes material, in a jury case, it is always "a question of fact for the jury;" but it by no means follows that if a court, without a jury, finds fraud to exist, it is always done upon the theory of a conclusive presumption. "Where the fraud is *self-evident*," says Mr. Bigelow, "it is the proper province of the court to *adjudge* upon it."¹ In such a case, it is as much fraud in fact, or actual fraud, as if some question had arisen for a jury to pass upon.

The truth is, that fraud is in one sense always a question of law; that is to say, it must be determined by a court, as a matter of law, upon the facts of the case. In another sense, fraud is often to a certain extent a question of fact; that is to say, facts must be ascertained upon which the court can base its judgment. There is, therefore, "fraud in law," in a certain sense, in all cases involving fraud; and in many of them "fraud in fact," in a certain sense; yet these terms are in themselves so ambiguous that they might well be disused. Cases involving fraud are readily divisible into several classes. In one class, the facts may not disclose actual fraud or an intent to defraud; yet, by reason of the intimacy of the relations between the parties, the law, from public policy, arbitrarily or by construction sets aside the transaction as fraudulent; and this is constructive fraud in the strict sense. In another class, the facts again may not disclose actual fraud or an intent to defraud, yet either fraud or a fraudulent intent may be fairly presumed, so as to shift the burden of proof; so that in the absence of a satisfactory explanation, there will be an adjudication of fraud, which may be classed as presumptive fraud. In another class of cases, the intent of the parties, or one of them, may be material; if, before a jury, the

¹ Big. on Fraud, 468.

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fact of such intent is to be determined by the jury; and if the jury find such an intent, the judgment of fraud is then pronounced by the court. In many jurisdictions, a court of equity may determine the fact of a fraudulent intent without the aid of a jury; or in some jurisdictions, such aid may be invoked at the discretion of the court, or at the option of a party to the cause. In still another class of cases, the facts of the case are apparent to the court; it may be upon the face of a mortgage, or it may be by the admission of the parties to the cause; and without reference to the intent of any of the parties, the court sees the fraudulent character of the transaction as plainly as if an intent to defraud had been proven or admitted. Here the duty of the court seems plain and unavoidable, to adjudge the fraud as a conclusion of law. *Robinson v. Elliott*, *Brett v. Carter*, and kindred cases fall within this class. It is only those classes of cases which must turn upon a fraudulent intent, to which statutes can apply, like those in Indiana and Michigan, which provide that the question of fraudulent intent shall in all cases be a question of fact.¹ It would be impracticable, if it were desirable, to put all cases involving fraud upon a Procrustean bed of fraudulent intent. Sometimes, therefore, actual fraud is adjudicated by the court upon the intent of the parties, irrespective of other facts, (as, for instance, the *bona fides* of the indebtedness in the case); and sometimes, also, actual fraud is adjudicated by the court upon the facts of the case, irrespective of the intent of the parties. All these classes of cases have been comprehended in the frequent declarations of the courts that fraud is the “judgment of the law upon *facts and intents.*”²

¹ *Robinson v. Elliott*, 22 Wall. 513.

² *Doe dem. Otley v. Manning*, 9 East, 64; *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57; *Beers v. Botsford*, 13 Conn. 146; *Sturtevant v. Ballard*, 9 Johns. 337; 6 Am. Dec. 281; *Morgan v. Elam*, 4 Yerg. 438; *Worseley v. De Mattos*, 1 Burr. 467; *Rea v. Alexander*, 5 Ired. L. 644.

§ 120. **The law and the facts in cases of alleged fraud.**—A very full explanation of the relative offices of the court and the jury in these cases is given in *Hughes v. Cory*,¹ by Judge Dillon, who, it would seem, might have applied his own rules to the case of the mortgage on a stock of goods, then under examination, but for the controlling influence of the Iowa statutes. He says: “A mortgage may be fraudulent in fact because there is no real debt; or if one, because it is knowingly and purposely overstated, to deceive and keep off other creditors. When these *facts* are proved, fraud is an inference of law, and the jury is, under the direction of the court, bound to find it; or though there be a real debt, yet if it can be shown that the controlling motive and object in making and taking the mortgage were not to secure the debt, but to hold the instrument as a shield to protect the debtor from his other creditors, this would make the mortgage fraudulent. The court should so instruct and the jury so find. These are merely instances of actual fraud, and other cases may easily be imagined. Any instrument is fraudulent which is a mere trick or sham contrivance, or which originates in bad motives or intentions,—that is, made and received for the purpose of warding off other creditors.” Here the learned judge refers to sham contrivances as one class of cases indicating actual fraud, and transactions originating in fraudulent intent as simply another class of similar cases, in which the judicial duty is the same.

The process in the judicial mind, therefore, in those cases where putative mortgages of merchandise are declared fraudulent, is a familiar one, corresponding to that adopted in all cases where self-evident or actual fraud is declared by a court. If the agreement that the mortgager shall retain the possession, potential control, and right of disposition of the goods appear on the face of the mortgage, the court, in

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exercising the duty of construing that instrument, ascertains the fraud; and no further duty could in such a case be assigned to a jury than to find the fact of the execution of the instrument, if that were disputed. If such an agreement appears by evidence *aliunde*, the result is the same when the fact is found; and no further duty can properly be assigned to a jury than to determine the fact of the agreement; when that fact is found, by verdict of a jury or otherwise, the judicial process is the same as if the fact appeared on the face of the mortgage. In each of these cases the fraud is adjudicated by the court as actual, not presumptive fraud.

§ 121. Fraud predicated of the transaction itself, rather than of the motives of the parties. — But are the courts right who hold such a transaction to be actually fraudulent? Inasmuch as there is no universal and common definition of fraud, and it seems difficult to secure one, it may be that this is a question to be determined simply by the preponderance of authority; and if, as has been shown, the logical processes of jurisprudence have been properly employed in reaching the result that such a transaction is actually fraudulent, the weight of authority, if on that side, ought to be allowed to close the discussion. But the reasoning employed and the elucidation afforded by the courts in adjudicating that there is fraud in these transactions, seem sufficient to bring them within the original definition of fraud as deceit or covin. The question is, is it an actual fraud for A. to execute a so-called mortgage on his stock of goods to B., ostensibly to secure a debt, but reserving to himself, by an arrangement in which B. participates, the power to dispose of the goods in the usual course of trade at his discretion? First, inquiring in what sense the word fraud is used, we find it applicable to the transaction between the parties, rather than to their intent. Covin, in the old

English law, according to the definition given by Montague, Chief Justice, in 1550, was “a secret agreement determined in the hearts of two or more men to the prejudice of another.”¹ But the word agreement as used in this definition did not necessarily imply an agreement to commit intentional deception, or an agreement to attempt prejudice to another. The agreement to do the act in question was the fact to be determined, and the circumstance that it would operate to the prejudice of another was what made it covinous.

The juridical idea is the same in the adjudications in the class of modern cases under consideration. The intent of the parties (the mortgagee concurring) is that the mortgage shall operate in a certain manner. The transaction being tested by its characteristics, it is observed to be fraudulent. The mortgage is but nominally a mortgage, for the mortgager retains a full power of disposal of the property, and, in the language of Chancellor Kent, he “sports with the property as his own.”² To allow this transaction to stand as a mortgage is to treat a sham as a reality, and to allow it to operate as a deceit, for it would furnish the mortgager an effectual shield against his creditors, while he was exercising all practical ownership over the goods. Finding this to be the operation of the transaction, the court adjudges it to be a fraud; and this without inquiring whether the parties intended to defraud, or intended anything more than to do what they actually did. Is this other than an actual fraud? If the character of “fraudulent” is imputed to the transaction, and not to the parties thereto, it is difficult to conceive of a more apt application of the term. This, it will be observed, is a rule of jurisprudence, or of substantive law, and not a rule of evidence or of mere procedure. No process of presumption has been employed;

¹ *Wimbish v. Tailbois, Plowden*, 88 (at p. 54).

² *Riggs v. Murray*, 2 Johns. Ch. 565.

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but facts have been found with certainty, to which a definite rule has been applied.

§ 122. The courts test such mortgages by their characteristics. — This rule of testing the transaction by its characteristics, is the one applied in both the English and American cases already cited. It is applied as a rule of substantive law, based on the unreal and deceptive character of the transaction, which is held to render the transaction fraudulent. Its practical application in this class of cases begins with Twyne's Case,¹ where one reason given for the judgment of fraud was, “the donor continued in possession and *used them as his own*, and by reason thereof, he traded and trafficked with others, and defrauded and deceived them.” Said Lord Mansfield, in a case of this sort:² “They who dealt with him trusted to his visible trade and stock; they were imposed on by false appearances.” It was inconsistent,” said Lord Kenyon,³ that the grantor should “execute acts of ownership,” after having ostensibly parted with her property to another. Such a transaction was in Virginia held to be “*felo de se*;” “as a security, naught,” but resulting in merely a personal security; a reservation to the grantor of a full power of revocation, and therefore “fraudulent *per se*.⁴” Such a transaction being designed by the parties to be not operative between themselves, and being necessarily prejudicial to the rights of other parties, the New York courts pronounce it “conclusively fraudulent.”⁵ The Ohio courts find its only and necessary effect to be that of “a ward to keep off other creditors.”⁶ The Supreme Court of the United States takes the same

¹ 3 Coke, 80.

² Worseley v. DeMattos, 1 Burr. 467.

³ Paget v. Perchard, 1 Esp. 205.

⁴ Lang v. Lee, 3 Rand. 410.

view, and says that such a mortgage "is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor;" and that at last "it is but an expression of confidence, for there can be no real security where there is no certain lien."¹ In Wisconsin, such an instrument is thought to be "*per se* fraudulent and void in law," and "the fraud which the law imputes to it is conclusive."² In Tennessee, it is considered that in such a transaction there "are such facilities for fraud that it must be held as wanting in legal good faith, on the plain principle that every reasonable man is presumed to intend the probable consequences of his own acts;" and "there is clearly a benefit contracted for to the grantors, and a prejudice to the rights of other creditors."³

In short, to sum up the whole argument, a mortgage or conveyance of this kind presents a false appearance, is only a pretence as a mortgage, is calculated to deceive, cannot fail to deceive if it be operative, furnishes unusual facilities for fraud, reserves benefits to the grantor, and prejudices other creditors. When it thus appears that the transaction is, in its results, so fraudulent, and so injurious to creditors, that few transactions could be more so, even where an intent to defraud exists so as to bring them within the statute of 13 Eliz., the courts are as ready to adjudge the transaction fraudulent as they would be if a fraudulent intent appeared.

§ 123. Registration does not validate a fraudulent transaction.—It has been sometimes urged that all the fraudulent characteristics of such a transaction are eliminated as soon as the contract is registered. This argument proceeds on the erroneous supposition that constructive notice of a fraud renders the fraud inoperative; and it in-

¹ *Robinson v. Elliott*, 22 Wall. 513. ² *Blakeslee v. Rossman*, 43 Wis. 116.

³ *Bank v. Ebbert*, 9 Heis. 153.

volves an erroneous understanding of the office of registration of chattel conveyances. It is hardly to be believed that any court would consider constructive notice of an intentional fraud as sufficient to purge the transaction. Suppose A. and B. to enter into a written contract, one stipulation of which provides that B. shall cheat C., and then the contract is registered; would constructive notice to C. by means of the registration suffice to validate the transaction between B. and C., so that C. could not avoid it for the fraud? Or suppose D. to convey all his real estate in trust to E. for the benefit of D.'s wife and children, expressing upon the face of the deed that it is to prevent F. from levying his execution upon it; would registration of that deed operate to prevent F. from having the voluntary conveyance set aside? Yet these are simply cases of fraud, evidenced by different facts. The fraud is still fraud, and it is adjudged to be such, in cases where a mortgager of goods reserves the possession with power of sale in the usual course of trade. The truth is that the constructive notice given by registration of chattel conveyances is designed to and does operate only upon the question of possession of the property. The distinction has been frequently pointed out by the courts, among them the Supreme Court of the United States in *Robinson v. Elliott*.¹ The rule is the same in England, under the "Bills of Sale Registration Act." Mr. May says, in his work on Fraudulent Conveyances:² "Of course the mere fact of due registration of a bill of sale under this act does not necessarily make it good against creditors;" though "it gives publicity to the transaction, and in that way removes one great element of fraud," namely, that arising from retention of possession alone.

Mr. May's treatise sheds still further light on the subject. Judge Lowell, in *Brett v. Carter*,³ referred to this valuable

¹ 22 Wall. 518.

² p. 120.

³ 2 Low. 458.

work as stating the law of England to be, that in the cases under discussion the question of fraud is always one of fact. This is taken from page 106, where Mr. May says: "It appears, then, that in all cases of this nature the question of fraud or not is a question of fact for a jury." But the learned judge overlooked the fact that when using this language Mr. May was speaking of that class of cases where the retention of possession alone is claimed to be fraudulent. What that author says of the law of England as affecting the class of cases now under consideration will be found at page 100, in these words: "The rule seems to be that where there is an absolute conveyance, and the grantor remains in possession *in such a way as to be able to use the goods as his own*, it is always void against creditors, even though made on valuable consideration." This indicates that the substantive law of England is in accord with the prevailing doctrine in America.

§ 124. The policy of allowing such transactions considered. — Second: Is the doctrine of *Robinson v. Elliott* "contrary to sound policy?" The argument that it is so rests on the proposition that because the statutes requiring registration of chattel mortgages "are a substitute for possession by the mortgagee, and repel all imputation of fraud which would arise from the want of it," therefore, there is no reason why a reasonable use of the property by the mortgager should be prohibited; and that "if the use be such that the property is not consumed by the very act of using it, there can be no reasonable objection to allowing such use."¹ This argument presents two difficulties. It does not follow that because the statute relieves the case of all imputation of fraud so far as concerns possession alone, it is also potent to relieve as to fraud resulting from possession with discretionary power of sale. To suppose so is to

¹ *Jones on Chat. Mort.*, sect. 380.

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disregard entirely the distinguishing element of such a power of sale. This feature of such conveyances is contrary to "sound policy," no less than to "sound principles of jurisprudence," and for the same reasons already referred to; jurisprudence and policy concurring in this respect. Again, it cannot be said of a discretionary power of sale, that it is a use "such that the property is not consumed by the very act of using it," for the result under the exercise of such a power is an effectual consumption of the property so far it concerns all creditors and their liens, either present or prospective; so that a use which implies an unlimited power of sale is precisely equivalent to a use which involves consumption of the property. Even in Massachusetts, it is held that if a mortgager "uses and consumes the property in the same manner as he would have done if no mortgage had been made,"¹ the transaction is fraudulent as against creditors. In both classes of cases, whether the grantor has consumed the property or has sold it, he has continued to use it as his own; in either case, the property flies out from under the supposed lien, and is gone; the debtor has appropriated it to his own use; it is out of the reach, not only of other creditors, but of the very creditor who, it was pretended, was secured; this creditor has, either directly or tacitly, sanctioned the arrangement by which the result was accomplished; and the pretended security has in every such case operated for the benefit of the debtor alone. Can there be any view of sound policy which will allow such results to flow from a conventional arrangement between debtor and creditor? Or could any sound policy do otherwise than to condemn in advance all conventional arrangements under which such results are probable?

§ 125. Arguments in favor of such a policy answered.—
The argument has been frequently pressed with earnestness

¹ *Robbins v. Parker*, 3 Met. 117.

in detail; but in every instance, the answer to the argument seems plain and irrefragable. A "good reason" why the mortgager of a stock of goods should remain in possession, and continue to make sales in the usual course of his trade, has been assumed to be this, that "he can manage them better than the mortgagee can."¹ The answer to this suggestion is: It is because it is better, but better only for the mortgager himself, that jurisprudence and policy interpose an objection. But, "Neither can a trader or manufacturer stop his business in order to give security to a mortgagee of his stock."² Answer: Then he should not *pretend* to "give security;" sound policy, as well as the law, demands frankness and honesty, and reprobates pretences; as the trader or manufacturer cannot in good faith "give security," it is fraudulent to pretend that he can. But, "It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose."³ Answer: This is a *non sequitur*; the right to mortgage a stock of goods for a useful purpose can scarcely be impaired by a rule which prohibits a mortgage of such goods for a vicious purpose. But, "If he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business."⁴ Answer: That is what the law means by "security" and "mortgage;" if the "mortgage" be not a real security, it is but a sham. To attempt to fasten a valid and certain lien upon goods which may at any moment, at the will of the debtor, fly out from under the lien, is to attempt a legal and moral impossibility. To pretend seriously that such a thing is possible, is fraudulent. But, "To hold that a merchant cannot mortgage his goods without closing his doors, would be to hold that no mortgage of a merchant's stock can be made

¹ Jones on Chat. Mort., sect. 381.

³ Brett *v.* Carter, 2 Low. 458.

² *Ibid.*

⁴ *Ibid.*

at all."¹ Answer: To this objection it may be replied that, if what is implied be added, viz.: that no mortgage of a stock can be made which shall continue it as a stock in usual trade, it then states and illustrates the case exactly, and thus it is no objection at all. No mortgage can be made of a merchant's stock, which keeps his doors open for the purposes of the merchant's business, because such a transaction would be inconsistent with the very character of a mortgage.

§ 126. Defective views of the subject illustrated. — A good illustration of the defective view of the real question which distinguishes all these objections to the doctrine, is found in the argument which was pressed upon the court in *Hedman v. Anderson*.² The trial court had been asked to charge the jury that a mortgage on a stock of goods in trade would be vitiated by an agreement, in or out of the mortgage, allowing sales by the mortgager in the usual course of trade; and that the jury might consider, in determining the question, the fact that such sales were made with the knowledge of the mortgagee, and without objection by him. Counsel for the defendant in error, arguing to sustain the action of the court in refusing such instruction, said: —

“The substance of the alleged error in the rulings of the district court is this: that the mere fact that the mortgager disposed of some part of the property for his own use, with the knowledge and without the dissent of the mortgagee, did not of itself render the mortgage void as to the plaintiff, provided there was no agreement in or out of the mortgage that the property might be so disposed of. This was not error. The cases do not say so; and the proposition that such an acquiescence by the mortgagee necessarily ren-

¹ *Gay v. Bidwell*, 7 Mich. 519; *Hickman v. Perrin*, 6 Cold. 135.

² 6 Neb. 392.

ders his mortgage void, that it nullifies and makes worthless a security valid and unassailable down to the moment of such permission, is untenable upon grounds of reason. To what results would that doctrine lead? A mortgage is given for money loaned. There is no intent to defraud. It contains no power of sale or disposition by the mortgager. It even says in terms that he shall not sell, or dispose of, or remove it, and if he does so, or attempts to do so, the mortgagee may take possession and foreclose. It covers one thousand barrels of flour; but the mortgager takes one, or ten, and uses them in his family, with the acquiescence or affirmative permission of the mortgagee. It covers a stock of goods. But the mortgagee sees the mortgager sell a few articles to customers, or take a pound of tea for his own use, or cut off a shroud to bury his child in, and makes no objection. Down to this time his mortgage has been honest and valid, and unimpeachable by creditors or others; but by this act of silent acquiescence, or positive consent, he forfeits all rights under it. His security is blown away with all the suddenness and effectiveness of a dynamite explosion. Yet the position of plaintiff in error leads exactly to that conclusion. It rejects every test of an intent to defraud, all inquiry as to an agreement for a power of disposal, all investigation as to whether any wrong is being done to creditors, and makes the fact of any sale, any disposal, any use of the mortgaged property by the mortgager, operate *per se* to nullify and invalidate a security not either void or voidable at its inception."

Inasmuch as the trial court had been asked to leave to the jury the question whether a single instance of a sale of goods by the mortgager would be sufficient proof of an agreement to allow such sales, the argument drawn from the insignificant character of a single small sale does not aid in the consideration of the question of law. Certainly, the question whether the vicious agreement is sufficiently proven

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is merely a question of evidence. The important question is, supposing it to be well proven, what rule of substantive law or of sound policy applies? The argument above quoted, in common with all the others on the same side of the question, exhibits a conspicuous inattention to the essential requisite of a mortgage of personality, that it must be a certain security upon specific property; and it further ignores the manifest inconsistency of allowing the mortgager a discretionary power of sale over the property.

§ 127. Characteristics of a Chattel Mortgage. — What is a mortgage? The definition given by the learned author of the treatise on the “ Law of Mortgages of Real Property” is so succinct and clear that it will doubtless meet universal approval, viz.: A mortgage is “ a qualified conveyance of property, whereby the owner *parts with it so far as to make it a security to his creditor*, and his creditor holds it in such a way that the owner may, *by equitably fulfilling his obligation*, have his own again.”¹ Further: “ It must clearly indicate *the creation of a lien*, specify the debt to secure which it is given, and *the property upon which it is to take effect*.”² *Mutatis mutandis*, the same description and conditions will apply to and characterize a mortgage of chattels. The same author says of this class of conveyances: “ A formal mortgage of personal property is a conditional sale of it *as security* for the payment of a debt or the performance of some other obligation. If the condition be not performed according to its terms, the thing mortgaged is irredeemable at law, though there may be a redemption in equity, or by force of statute. Such a mortgage is something more than a mere security. It * * * operates to transfer the legal title to the mortgagee, to be defeated only by a full performance of the condition.”³ Such a conveyance differs from a mortgage of real estate in respect of the

¹ Jones on Mortgages, sect. 8.

² *Id.* sect. 60.

³ Jones on Chattel Mort., sect. 1.

character of the estate vested in the mortgagee. But in the main elements of a mortgage, it bears so close a resemblance to a mortgage of real estate, as fully to justify the use of the term "mortgage" in describing it. Among these elements are, a certain and unambiguous description of specific property, and a certainty of lien; and these are essentials. To apply the term to an instrument under which the owner of the property gives his creditor no real security, no certain lien, which takes no effect upon the property described if the grantor so wills, and under which he may at his pleasure recover the property as his own, by selling it and pocketing the proceeds, without fulfilling his obligation, is to disregard all the foregoing excellent definitions of a mortgage, and to make a sham the equivalent of a reality. If a chattel mortgage having the essential features of certainty of property and lien were suddenly to lose by any means the element of certainty of lien, it may not be a very violent figure of speech to say that the mortgagee's security "is blown away with all the suddenness and effectiveness of a dynamite explosion." But this is only saying in another form that the element of certainty of security is essential to a mortgage.

§ 128. Effect of a power of sale reserved to the Mortgager.—One other objection to the doctrine of *Robinson v. Elliott* is said to be that "it assumes a power of disposition in the mortgager such as is never given, namely, a power to dispose of the whole property at once; whereas the power of disposal in such mortgages is merely that the mortgager may sell in the ordinary course of trade." A power to sell the whole "might well be regarded as rendering the instrument void;" but permission to sell at retail is only "permission to free small portions of the goods, from time to time, from the incumbrance of the mortgage."¹

¹ *Jones on Chat. Mort.*, sect. 420.

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This would seem to be a distinction without a difference. Permission to sell "portions, from time to time," is exactly equivalent to permission to sell, during the entire lapse of time, the whole. Courts would take judicial knowledge of the fact that merchants buy goods only to sell, and that the success of their business as a whole depends upon the sale of all their goods. Under the usual provisions of such mortgages, it is intended that as fast as "small portions of the goods" are freed from "the incumbrance of the mortgage" by sale, other goods are to be purchased, which shall pass under the incumbrance.

In *Phelps v. Murray*,¹ it was held by a learned judge that such a contract "is against public policy, throwing open too wide a door for possible fraud." This view is, even by those who insist that the doctrine is contrary to sound policy, admitted to be "entitled to candid consideration."² Must not candor admit further that the possibilities of fraud under such a transaction are exceedingly numerous, and that no sound policy can tolerate them for this reason?

§ 129. Reasons for the existence of the doctrine.—Third: The foregoing considerations serve to show, to some extent, that the doctrine in question has reasons for its existence, derived from general observation and experience. Various courts, both English and American, when called upon to deal with such conveyances, have put upon record their judgments as to the operation of these conveyances in actual practice. As observers, their reports of what they have observed are entitled to consideration. It has been assumed that "as a matter of experience and observation, the courts *must* have seen that such mortgages are no more likely to be fraudulent in fact than any other; and they *must* have seen that, in a mercantile or manufacturing community, if not elsewhere,

¹ 2 Tenn. Ch. 746, *per* Cooper, Chancellor.

² *Jones on Chat. Mort.*, sect. 423.

the doctrine works badly."¹ This assumption is not supported by the large majority of the decisions. In the many cases heretofore cited, while the courts have generally agreed that fraudulent intent was immaterial to the inquiry, they have concurred in adjudicating that the transaction is actually fraudulent. Learned courts, as a rule, are acute and trained observers; and when they not only concur in declaring the doctrine in question a salutary one, but state further the important facts which they find to demand its application in particular cases, they may well be taken as furnishing abundant reasons therefor, derived from their own general observation.

§ 130. **Testimony of negative witnesses.**—The courts who are unable to see the fraud in such cases have frequently placed themselves in the attitude of merely negative witnesses. Judge Lowell said, in *Brett v. Carter*:² "If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is, that this brings us to an ultimate fact of observation and experience, and *I am unable to see the necessity.*" Judge Story said, in *Mitchell v. Winslow*:³ "I am not aware of any policy of the law, or any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it, by the exercise of reasonable diligence. I profess that *I am not able to perceive any.*" And Judge Dillon, in *Hughes v. Cory*,⁴ after stating argumentatively the provisions of the Iowa statutes as to attachments and receivers, distinguishing the Iowa practice from that of other States, and claiming that under that practice the mortgage would be no obstacle to other creditors who might wish to levy on the goods, said: "*Nor do we see that the mortgage, in the sense prohibited*

¹ 5 Sou. Law Rev., p. 661.

³ 2 Story, 630.

² 2 Low. 458.

⁴ 20 Iowa, 399.

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by the law, reserves an interest in or secures a benefit to the mortgager at the expense of his other creditors."

These are trained observers, who have not, however, been able, as they declare, to see the fraudulent or vicious effect of such transactions.

§ 131. Testimony of affirmative witnesses. — On the other hand, the trained observers are numerous who profess to have learned by their own observation the reasons for the existence and the application of this doctrine. Mr. Justice Davis said of the mortgage investigated in *Robinson v. Elliott*,¹ "Manifestly it was executed to enable the mortgagers to continue their business, and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. There was nothing to put creditors on their guard. This long-continued possession and apparent ownership were well calculated to disarm suspicion." In *Twyne's Case*, the judges of the Star Chamber observed that the donor continued in possession of the goods, "and used them as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them." Lord Hardwicke and his associate judges saw that such an arrangement under a mortgage "gives the mortgager a false credit."² Lord Mansfield thought those who dealt with the grantor under such circumstances "were imposed on by false appearances."³ Mr. Justice Buller's suppositive colloquy between mortgager and mortgagee imputes to the latter the proposition, "Give me the command of the property, and you shall have it to hold out to the world and your creditors as your own."⁴ In *Lang v. Lee*,⁵ the court could not "imagine a power more completely adequate to the destruction of the avowed purpose

¹ 22 Wall. 513.

⁴ *Edwards v. Harben*, 2 Term, 587.

² *Ryall v. Rolle*, 1 Wils. 260.

⁵ 3 Rand. 410.

³ *Worseley v. De Mattos*, 1 Burr. 467.

of the deed ;" which power was described in *Sheppards v. Turpin*¹ as one by which the grantor might, "without any violation whatever of the express stipulations of the deed, divert the whole of the property to uses and purposes wholly foreign to the leading object avowed." Exercising such a power in another case, "up to the date of the levy of the execution, the grantor carried on his business just as he did before the execution of the deed, selling the goods, receiving the money, buying other goods, rendering no account, but conducting his business as if no deed had been executed."² The New York courts declare that "to sanction a transaction like this would open a door to frauds innumerable, and to an extent incalculable ;"³ its effect would be "not to create an absolute lien on any property, but a fluctuating one, which should open to release that which should be sold, and take in what should be newly purchased ;"⁴ and "its only operation must be to the prejudice of others."⁵ Such a mortgage is in New Hampshire observed to be "like a kaleidoscope ;"⁶ and to be "practically effective only to ward off the claims of other creditors."⁷ If it were maintained, "the mortgager would dispose of the goods for his own benefit and without paying the mortgage debt, and then mortgage the goods, obtained to replenish his stock, to the same friend for the same debt, and so continue his business and be enabled to snap his fingers at his other creditors."⁸ The consequences of maintaining such transactions as valid "would be most disastrous."⁹ In Ohio, such a mortgage was seen to be "no specific lien, but a floating mortgage, which attaches, swells

¹ 3 Grat. 357.

² *Perry v. Bank*, 27 Grat. 755.

³ *Divver v. McLaughlin*, 2 Wend. 596, 20 Am. Dec. 655.

⁴ *Mittnacht v. Kelly*, 3 Keyes, 407.

⁵ *Russell v. Winne*, 37 N. Y. 591.

⁶ *Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603.

⁷ *Putnam v. Osgood*, 51 N. H. 192.

⁸ *Ibid.*

⁹ *Ibid.*

and contracts, as the stock in trade changes, increases and diminishes, or may wholly expire by sale at the will of the mortgager.”¹ It was said of such a mortgage in Illinois: “If this was not intended to defraud other creditors, it certainly was well calculated to do so, as it placed all of K.’s property beyond their reach for fifteen months, and enabled him to carry on his business with the property, precisely as though it was not incumbered.”² According to the observations of the Tennessee courts, the reservation of the power of sale in such a mortgage “is totally inconsistent with the rights of other creditors, and of necessity vitiates” the transaction;³ in it there “are such facilities for fraud, that it must be held wanting in legal good faith;”⁴ such stipulations “tend inevitably to give a fraudulent advantage to the debtor over his other creditors;”⁵ and the mortgage “does hinder and delay creditors in the enforcement of their claims,”⁶ while at the same time it opens “too wide a door for possible fraud.”⁷ In Mississippi, as in New York and Ohio, such a mortgage was looked upon as “a shifting lien, which took hold of the goods on hand; and as these were sold off, it separated itself, but at once fastened upon the note or book account owing by the buyers;” and in the meantime, as the transaction appeared to the court, “the other creditors must stand the varying fortunes of the venture, without power or right to move against the goods;”⁸ from which it was “manifest that the object was not to apply these things to the payment of the debts, but to secure the debtor in their possession and enjoyment.”⁹ The characteristics of another such arrangement were seen to be that it “was

¹ *Collins v. Myers*, 16 Ohio, 547.

⁵ *Ibid.*

² *Greenebaum v. Wheeler*, 90 Ill. 296.

⁶ *Ibid.*

³ *Galt v. Dibrell*, 10 Yerg. at p. 155.

⁷ *Phelps v. Murray*, 2 Tenn. Ch. 746.

⁴ *Bank v. Ebbert*, 9 Heisk. 153.

⁸ *Harman v. Hoskins*, 56 Miss. 142.

⁹ *Bank v. Douglas*, 11 S. & M., at p. 541.

antagonistic to the regular and usual course of business, tended to break down commercial confidence and credit, and to entail losses upon those who trusted their goods and property to the retail merchant ;" which arrangement was adjudged to be " fraudulent as to subsequent creditors, as much so as if it had been contrived with that motive and for that object."¹ The courts of Wisconsin, Indiana, Pennsylvania, Connecticut and Missouri have in like manner announced, in express terms, their respective observations of the workings of such arrangements between an embarrassed debtor and his creditor. And the United States courts have given frequent confirmations of these observations; saying of one such mortgage that it was "a sham, a nullity, a mere shadow of a mortgage, only calculated to ward off other creditors; a conveyance in trust for the benefit of the person making it; "² and of others, that they must necessarily hinder, delay, and defraud creditors.³

§ 132. Testimony of other observers. — Nor are the observations of the vicious consequences resulting from such attempts to qualify or limit the effect of a mortgage upon chattels confined to those courts which declare these arrangements fraudulent. Other courts, which entertain a different view of the substantive law of the case, have professedly seen the difficulties, or some of them, inherent in such transactions. In North Carolina, the following features were observed in a case then under examination: " The merchandise retailed lost the power of identity as soon as sold. The *corpus* itself was lost and destroyed beyond pursuit or recovery. The power to sell was the power to destroy, and the sale was the destruction and extinction of the property."⁴ In Alabama, one such transaction was ob-

¹ *Hilliard v. Cagle*, 46 Miss. 309.

² *Catlin v. Currier*, 1 Saw. 7.

³ *Re Burrows*, 7 Biss. 526: *Re Bloom*, 17 N. B. R. 425.

⁴ *Cheatham v. Hawkins*, 76 N. C. 335.

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served to be devoid of “ even the dubious merit of providing that the proceeds of sales to be made shall be paid over to the mortgagee ;”¹ and another was seen to be “ a device to defraud creditors, and through that medium to give the debtor the control and enjoyment of his property.”² It is believed in Georgia that “ the permission to give such a mortgage, though a very convenient privilege, is one very easily used to commit fraud.”³ In Kansas, it is conceded that “ doubtless such arrangements are liable to abuse, and should always be closely scanned.”⁴ Even in Iowa, it is understood that “ if the mortgager is permitted to deal with the property as his own, the mortgage security is not altogether safe or certain ; much is necessarily left to the honesty and good faith of the debtor.”

These deceptive, misleading, injurious, and vicious characteristics, as seen in such transactions by these numerous and careful observers, according to their own statements, furnish the sufficient reasons for the existence of the doctrine of *Robinson v. Elliott*.

¹ *Price v. Mazange*, 81 Ala. 701.

² *Smith v. Leavitts*, 10 Ala. 92.

³ *Goodrich v. Williams*, 50 Ga. 425.

⁴ *Frankhouser v. Ellett*, 22 Kas. 127, 31 Am. Rep. 171.

⁴ *Torbert v. Hayden*, 11 Iowa, 435.

CHAPTER IX.

SUPPOSED QUALIFICATIONS OF THE DOCTRINE.

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§ 133. **Supposed qualifications stated.** — Notwithstanding the clearness with which this doctrine has been enunciated in America, the numerous cases which illustrate its fundamental position in our jurisprudence, and the abundant reasons furnished by the courts for its existence, it has been gravely argued that this doctrine has been so qualified by leading courts as greatly to weaken its force and lessen its value, if indeed it has not been thereby emasculated. In the treatise mentioned in the preceding chapter, the follow-

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ing have been stated as substantial qualifications of the doctrine. “ *First.* If the agreement (*i.e.*, that the mortgager may dispose of the mortgaged goods at discretion) be not contained in the mortgage itself, the question whether there is any such agreement, and what are the indications of fraud arising from it, is one for the jury. *Second.* If the agreement be to sell for cash for the benefit of the mortgagee, the mortgage is no longer conclusively fraudulent, but raises only a question of good faith for the jury. *Third.* The mere fact that the mortgager continues to sell the mortgaged goods, with the knowledge of the mortgagee, is not proof of an agreement between the parties for such sales, and does not render the mortgage fraudulent in law.”¹

§ 134. Importance of the supposed qualifications. — It is manifest that these, if in fact qualifications of the doctrine, are serious ones, and that, wherever admitted or recognized, they must tend to embarrass both the court adjudicating and the attorneys contesting any controverted case; for their effect would be to rob the doctrine of all its inherent vitality as a rule of law, and virtually to emasculate it. Counsel cannot safely advise clients as to the application to their cases of any rule of law, with the contingency in view that the court may abandon its function of adjudication and relegate the whole case to the jury. The accordant adoption by the courts of the United States and those of fourteen of the States, of such a rule of law, if well advised, and on clearly understood grounds, would give the doctrine strength and tend to insure its permanence. But if the doctrine in its integrity should receive only a nominal or partial assent, in any or all of the courts named, and were, in fact, frittered away by qualifications in this or that court, it would, to a corresponding extent, lose respect as well as force. Both courts and lawyers are thus interested

¹ Jones on Chat. Mort., sect. 424.

in ascertaining whether there are any just qualifications to the doctrine in question, and the grounds upon which they rest, and also, what is the real effect of the cases which have been supposed to qualify it. This effect will be best seen by searching for the underlying principles of those cases, and observing the manner in which those principles are allowed to operate therein. This, again, will be more fully illustrated by a brief glance at the extent to which, as well as the manner in which, those principles have been allowed to operate in other classes of cases; cases which are entirely different as to their facts, and are analogous only as being controlled by like principles.

To examine these questions understandingly, it will be necessary, first of all, to observe the essential characteristics of what are called legal doctrines.

§ 135. Substantive law and adjective law. — The distinction between substantive and adjective law has made its way slowly, but apparently surely, to a recognized place in jurisprudence. Doubtless, it is accepted by all students of the law who see it clearly, as inherent and essential. Substantive law not only has different aims, but is based on radically different principles from those which underlie adjective law. The former is, for obvious reasons, intrinsically more permanent and continuous, though not perfectly so; while the latter is more readily subjected to change and modification. Jurisprudence primarily deals with only the body of substantive law; while the body of adjective law is considered and discussed under the general term Procedure. It is only some rule of jurisprudence, some part of the substantive law, which can be called, in the strict sense, a legal doctrine.

§ 136. The law and the facts. — In all forensic controversies, two distinct elements are involved, which are

separately examined, namely, the law and the facts. For these purposes two distinct processes are employed. By one, the state of facts existing in the particular case is to be ascertained; by the other, the proper rule of substantive law is to be sought for and applied. First in order of time is the ascertainment of the facts of the case; then follows the application of the rule of law. The result of these two processes is an adjudication. Such is the recognized mode adopted by the judicial tribunals of English-speaking peoples; the Roman method not being in use, by which authoritative adjudications were made upon hypothetical cases. The rules of law newly deduced by this process add to the body of our jurisprudence. As it was expressed by a distinguished jurist: "The law does not consist of cases, but of the principles adjudicated in those cases;" and by another: "It consists of legal principles, lying above, and beneath, and around, and amid the decisions." But all questions as to the mode by which the facts shall thus be ascertained, are questions, not of jurisprudence, or of substantive law, but of procedure only.

Thus, in all forensic controversies, different states of facts usually call for the application of different rules of law; and this will always follow when the difference in the facts is substantial. It is, therefore, no disparagement of any legal doctrine, nor is it, in a proper sense, a qualification of it, to say that it has no application to other states of facts substantially different from those in which its application has become familiar.

§ 137. Second supposed qualification. — In the case of the second supposed qualification of the doctrine of *Robinson v. Elliott*, to wit: that requiring the proceeds of sales to be paid to the mortgagee takes the poison out of the infected transaction, it should be remembered that in addition to the state of facts to which that doctrine has been so often ap-

plied, there has now been introduced a new and substantially different fact, namely, that the sales to be made by the mortgager, whether in his own name, or as agent for the trustee named in the conveyance, are to be for the sole benefit of the secured creditor. Upon this state of facts, the new and different legal proposition is announced, that the stipulation that all sales shall be for the benefit of the mortgagee renders the mortgage no longer conclusively fraudulent, though it may present a new question of fact for the jury. The element of a discretionary power of sale, reserved to the mortgager, has been eliminated, and in its place is found the substantially different element of a power of sale as the mere agent and for the benefit of the secured creditor. The application to this state of facts of the different rule above stated, sustains the conveyance. Both rules stand well together, and jurisprudence shows no want of harmony in adopting both. The new state of facts supposed presents the familiar case of a contract which infringes no rule of law, and which is accordingly sustained. But it is also familiar law, that the most innocently appearing contract may be a cover for fraud. So the new state of facts supposed may, perhaps, present a case calling for an inquiry as to fraudulent intent. If so, it then presents "a question of good faith for the jury," for the question of a fraudulent intent is one always to be submitted to them. But it would be misleading to call this "a qualification" of the doctrine first referred to; and it would be erroneous to suppose that the submission of this new question to the jury involves an abandonment of the legal opinion of the court as to the substantially different case first stated.

§ 138. **A misapplied criticism.** — It has been urged: "Is there any the less a trust between the parties, when the mortgage provides that the mortgager shall apply the proceeds of all sales to the mortgage debt, than there is when

it says nothing about such application? The proceeds of the sales are in the mortgager's hands, and the mortgage lien does not cover them. If a mortgager's retention of a power of disposal of the mortgaged goods is inconsistent with the idea of a security, is the inconsistency any the less when the mortgager agrees to use the proceeds, not for his own benefit, but for the benefit of the mortgagee? Is not the distinction a mere shadow?"¹

This subtle criticism ignores the substantial fact which leads the courts to sustain the cases referred to, as well as one of the most substantial facts of those cases where the transaction is declared fraudulent. It is the use of the proceeds of sales by the mortgager on *his own* account that stamps such a "mortgage" as a fraud. It is a trust between the parties which reserves something for the benefit of the grantor, which is condemned by the law. A trust between the parties, which in good faith gives all the proceeds of the property to the creditor, is not objectionable. In such a case, "the proceeds of the sales are" *not* "in the mortgager's hands," — that is, in his hands alone. They are in his hands only as agent for the mortgagee, and are thus really in the hands of the latter, and the mortgage lien does cover them. The proceeds of the sales of the goods being faithfully devoted to the payment of the mortgage debt, there is no inconsistency with the idea of a security, but, on the contrary, an entire consistency. Of course, in all cases of this class, an entire and unimpeachable good faith in constituting the mortgager an agent for the mortgagee should be shown; and there may frequently be presented questions in this connection for a jury to pass upon. But when the substantial fact appears that the proceeds of the sales of the goods have been fully and unequivocally applied to the payment of the debt secured, then the fact that the mortgage

¹ Jones on Chat. Morts., sect. 424.

has operated as a valid and certain security is beyond question. The distinction between this case and one where the mortgager handles and uses the proceeds of sales for his own convenience and benefit is thus seen to be a substantial one, and no "mere shadow"; and the "vital infringement" of the doctrine, which the critic imputes to this distinction,¹ disappears entirely.

§ 139. **A fundamental distinction.**— All cases in which a power of sale of the goods by the mortgager is provided for are, therefore, to be tested by the question whether such sales are to be made in his own behalf and at his own discretion, and with control of the proceeds reserved to him; or whether they are to be made solely in pursuance of the trust as a real one, that is, for the benefit of the grantee or mortgagee, and with provision that the proceeds shall be applied on his debt. Accordingly, it will be found that the courts which enforce the doctrine of *Robinson v. Elliott* will set aside the one class of conveyances and sustain the other, classifying the cases as they are presented by the application of the test stated. A careful observance of these rules by the bench will insure consistency in the decisions; and a careful examination of them by students will obviate any confusion or misunderstanding as to the effect of each decision.

Conveyances under which it was provided that the grantor should have possession and power of sale, virtually and practically, as agent for the mortgagee, or for the trustee named in the conveyance, have on this ground been sustained in Virginia,² New York,³ Ohio,⁴ New Hampshire,⁵

¹ Jones on Chat. Morts. sect. 424.

² *Janney v. Barnes*, 11 Leigh, 100; *Marks v. Hill*, 15 Gratt. 400.

³ *Ford v. Williams*, 24 N. Y. 359; *Miller v. Lockwood*, 82 N. Y. 293.

⁴ *Kleine v. Katzenberger*, 20 Ohio St. 110, 5 Am. Rep. 630.

⁵ *Wilson v. Sullivan*, 58 N. H. 260; *Barker v. Hall*, 18 N. H. 298.

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Wisconsin,¹ Illinois,² Missouri,³ Indiana,⁴ Connecticut,⁵ Nebraska,⁶ and in the United States Circuit Court.⁷ In each of these jurisdictions, the contrary doctrine of *Robinson v. Elliott* is enforced in all cases where the reservation to the grantor of a discretionary power of sale calls for the application of that doctrine.

§ 140. **Further examples of this distinction.** — Nor is there any real difference between those cases, so far as concerns the salient facts which should control their decision, and certain other cases in Maine,⁸ Massachusetts,⁹ and Iowa,¹⁰ in which the conveyance was sustained; for in these it appeared that the possession and management of the business were, in one way or another, for the actual benefit of the secured creditor. The crucial test of a faithful application of the proceeds to the secured debt would have sustained these transactions, even in case the courts of Maine, Massachusetts and Iowa had favored the doctrine of *Robinson v. Elliott*. Substantially identical in principle are cases in the English courts, involving general assignments for the benefit of creditors, in which it was provided that the assignees might employ the debtor as their agent in disposing of the goods, and which were on this ground sustained as valid.¹¹

§ 141. **Assignee must act in good faith.** — As a converse to this proposition, it has been held that, under

¹ *Fisk v. Harshaw*, 45 Wis. 665; *Cotton v. Marsh*, 3 Wis. 221.

² *Goodheart v. Johnson*, 88 Ill. 58.

³ *Hewson v. Tootle*, 72 Mo. 632; *Metzner v. Graham*, 57 Mo. 404.

⁴ *Lockwood v. Harding*, 79 Ind. 129.

⁵ *Kendall v. Carpet Co.*, 13 Conn. 383.

⁶ *Book Co. v. Sutherland*, 10 Neb. 334.

⁷ *Hawkins v. Bank*, 1 Dill. 462; *Overman v. Quick*, 8 Biss. 184.

⁸ *Abbott v. Goodwin*, 20 Me. 408; *Melody v. Chandler*, 12 Me. 282.

⁹ *Jones v. Huggeford*, 3 Metc. 515.

¹⁰ *Adler v. Clafin*, 17 Iowa, 89.

¹¹ *Janes v. Whitbread*, 5 Eng. L. & E. 431; *Coate v. Williams*, 9 Id. 481.

general assignments, the action of the assignees must be, in fact, as well as in name, for the benefit of the creditors; and if in any respect it is not such, but is really for the benefit of the grantor,—as, by continuing his business generally and unduly in the old way,—the assignment will be held void, even although the assignees have personally undertaken to execute it.¹ It will be “regarded, in conscience and law, as a fraud.”² On a like principle it is held in Massachusetts that if a pledgee permit the property to remain in possession of the pledger, he loses all benefit of the pledge.³

§ 142. **Sale by mortgager passes title.**—Testing all such cases by this fundamental question of the discretionary control of the mortgager over the mortgaged property, the courts frequently find other consequences logically resulting from the application of this doctrine. One of these is, that under all sales made by the mortgager, the title to the property will be passed, as was suggested by the Virginia Court of Appeals, in the earliest American case,⁴ and the mortgagee will be estopped to deny the title of the purchaser. This necessary result from the application of the rule has been frequently adjudicated.⁵ Even in Massachusetts and Maine, this is recognized as a necessary consequence of allowing the mortgager to make sales of the goods.⁶

¹ *Am. Ex. Bank v. Inloes*, 7 Md. 380; *Owen v. Body*, 5 Ad. & E. 28; *Whallon v. Scott*, 10 Watts, 287; *Doyle v. Smith*, 1 Coldw. 15; *Woodward v. Goodman*, 3 Cent. L. J. 43; *Richardson v. Marqueze*, 59 Miss. 80, 42 Am. Rep. 353; *Mattison v. Judd*, 59 *Id.* 99.

² *Bank v. Inloes*, 7 Md. at p. 391.

³ *Thompson v. Dolliver*, 132 Mass. 103.

⁴ *Lang v. Lee*, 3 Rand. 410.

⁵ *Ogden v. Stewart*, 29 Ill. 122; *Miller ad. Pancoast*, 29 N. J. L. 250; *Bank v. Hampson*, L. R. 5 Q. B. Div. 177; *Walker v. Clay*, 42 L. T. (n. s.) 369.

⁶ *Shearer v. Babson*, 1 Allen, 486; *Stafford v. Whitecomb*, 8 *Id.* 518; *Hubbard v. Lyman*, 8 *Id.* 520; *Bank v. West*, 46 Me, 15.

§ 143. Grantee in fraudulent conveyance acquires no rights thereunder. — Another logical consequence from this doctrine is, that inasmuch as the mortgage transaction is tainted with fraud by the agreement allowing discretionary sales by the mortgager, the mortgagee can, under such a conveyance, acquire no rights in or to the goods pretended to be conveyed; so that his attempt to take possession of the goods under the mortgage so tainted, will in no respect enlarge his rights or his remedies in the premises. The goods will remain subject to levy at the suit of the other creditors of the mortgager, though in the possession of the mortgagee, if it be a possession so obtained. Decisions to this effect are numerous.¹ The same rule was applied in one State to a case not involving a stock of goods in trade, but in which a conveyance had been declared void by reason of fraudulent intent, clearly proved.²

§ 144. New transaction between parties may be valid. — As a converse to this proposition, it is to be observed that if, instead of acting upon the invalid mortgage, and asserting rights under it, the mortgagee practically abandons the mortgage, and enters into a new contract with the mortgager, by which he purchases the stock of goods, even though he do not pay for them otherwise than by crediting their value on his debt, an entirely new and distinct state of facts is again presented, calling for the interposition of different rules of law. Distinguishing this class of cases from those in which the principal doctrine is applied, may be considered by adverse critics another qualification of the

¹ *Robinson v. Elliott*, 22 Wall. 513; *Blakeslee v. Rossman*, 43 Wis. 116; *Delaware v. Ensign*, 21 Barb. 85; *Dutcher v. Swartwood*, 15 Hun, 31; *Catlin v. Currier*, 1 Sawyer, 7; *Stein v. Munch*, 24 Minn. 390; *Re Manly*, 2 Bond, 261; *Re Forbes*, 5 Biss. 510; *Re Morrill*, 2 Saw. 356, 8 N. B. R. 117; *Smith v. Ely*, 10 *Id.* 558.

² *Janvrin v. Fogg*, 49 N. H. 340.

doctrine, like the supposed ones referred to. It is, however, but the familiar case of a new state of facts, to which jurisprudence applies a different substantive rule. A mortgagee, who may have made a fraudulent agreement with his mortgager, is not, under existing rules of Anglo-Saxon law, to be punished for his offence, otherwise than by an adjudication that the fraudulent transaction is a nullity. He remains a creditor to the same extent as formerly; and he may, by a new transaction with his debtor, receive a preference, to the same extent and with the same limitations as any other creditor.

In *Robinson v. Elliott*,¹ in connection with the decision that the mortgagee could not assert or enforce any rights under the mortgage, it was intimated that a new transaction between the parties, by which the goods should be transferred and delivered to the mortgagee, might give the latter a new and legal right to them. This point has been directly decided by the courts of last resort in four cases, arising respectively in Minnesota,² New York,³ Mississippi,⁴ and New Hampshire.⁵ It is a logical conclusion from the circumstances of the case, and the legal relations and rights of the parties outside of the fraudulent mortgage. In the New York case referred to, the court, finding that "before any creditor questioned the validity of the mortgage, the goods in question were delivered into the actual possession of the plaintiffs, upon terms securing to them the custody and the right of disposition, freed from any feature of the kind alluded to," held that, irrespective of the question of their rights under the mortgage, "this delivery of the goods entitled the plaintiffs to receive and dispose thereof, and appropriate the proceeds in satisfaction of their own debt." The

¹ 22 Wall. 513.

² *Bank v. Anderson*, 24 Minn. 485.

³ *Brown v. Platt*, 8 Bosw. 324.

⁴ *Baldwin v. Flash*, 58 Miss. 593; 59 *Id.* 61.

⁵ *Petree v. Dustin*, 58 N. H. 309.

third of these cases has been twice before the Supreme Court of Mississippi, by whom the question was carefully considered.¹ A deed in trust having been given, conveying a stock of goods, and containing provisions which would have rendered the deed fraudulent under the settled jurisprudence of that State,² the grantor, by a new act of assignment, transferred the remaining goods to the trustee, for the benefit of the same creditor; and this transaction was held not fraudulent *per se* as to other creditors who proceeded subsequently against the goods. Though the inducing cause to the surrender of the goods was probably the invalid trust deed, yet as the transaction was not a seizure by the creditor, under the provisions of the deed, but was merely "the very frequent occurrence of a transfer of goods by a debtor to pay his creditor whom he prefers,"³ it was held to be a case determinable with reference to the actual intent of the parties as to the preference. An instruction having been given to the jury which ignored this salient feature of the case, the verdict against the preferred creditor was set aside, and a new trial was ordered, to determine the question of the *bona fides* of the preference, by inquiring into the actual motives of the parties. On a second appeal, the court re-affirmed and emphasized the view first taken of the case, saying of the surrender of the goods by the debtor to the trustee: "If that possession was surrendered on the one side, and received on the other, with the honest intention of paying a just debt, it was not made fraudulent by the unrecorded trust deed of the year before; it could be made fraudulent only by reason of some improper circumstance connected with the transfer itself, or because it was, in the opinion of the jury, but the consummation of a scheme devised and carried out for the purpose

¹ *Baldwin v. Flash*, 58 Miss. 593; 59 *Id.* 61.

² *Harman v. Hoskins*, 56 Miss. 142; *Joseph v. Levi*, 58 Miss. 843.

³ 58 Miss. 599.

of entrapping third persons.”¹ Therefore, “it was for the jury to say, under proper instructions from the court, whether in so doing the parties were then paying a just debt, or were consummating a scheme of fraud, concocted in the beginning or then designed.”² The court very pertinently referred to the cases of *Rowley v. Rice*,³ *Cook v. Corthell*⁴ and *Morrow v. Reed*,⁵ as authorities for the conclusion reached. In the first two cases, the mortgage was thought ineffective to cover after-acquired goods, and in the last named case, there were formal defects in the mortgage; but in each case the delivery of the goods by the mortgager to the mortgagee was held ample to vest in him the title, irrespective of difficulties as to the mortgage; so while the facts were different from those in the Mississippi case, the principle of law involved was substantially the same.

In the New Hampshire case,⁶ where, after such a mortgage, the mortgagors, by a transaction in the nature of a pledge, turned over the remaining goods, with others, to the mortgagees, and the goods were then sold for the benefit of the latter, the transaction was sustained as against a complaining creditor; but it was held that if the mortgagees had merely taken possession under the mortgage itself, the doctrine of *Janvrin v. Fogg*⁷ would have applied.

These cases present a novel phase of facts, in connection with fraudulent mortgages of merchandise; but the conclusions reached in them are thus seen to harmonize fully with those presented in *Robinson v. Elliott* and kindred cases.

The Missouri case of *Greeley v. Reading*⁸ indicates an inclination to favor the same doctrine. The mortgage in this case reserved on its face a power of sale to the mort-

¹ 59 Miss. 67.

⁵ 30 Wis. 81.

² *Id.* 66.

⁶ 58 N. H. 309.

³ 11 Met. 333.

⁷ *Ante*, sect. 143

⁴ 11 R. I. 482; 23 Am. Rep. 518.

⁸ 74 Mo. 309.

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gager, and the case was recognized as one which would ordinarily fall within the rule announced in *Weber v. Armstrong*.¹ But the new transaction between the parties, by which the mortgagee had obtained possession of the goods, was sustained. Though without a full consideration of the question, this was in approval of the conclusion reached in *Nash v. Norment*.² In this case, the mortgagee at request of the mortgager took the goods and sold them. The court thought the mortgager had “a perfect right to pay a creditor, and to protect Simpson, who had lent her money on the faith of this mortgage, by turning over to him actual possession of the property;” and that, though the law declared the mortgage “invalid as a security,” yet “as a transfer of possession took place before any creditor acquired rights to this property, the invalidity of the mortgage before possession by the mortgagee is unimportant.”

§ 145. First Supposed Qualification. — The supposed qualification first above named,³ which is imputed to several of the States in which the doctrine of *Robinson v. Elliott* has been adopted, presents a partially but not entirely correct statement of the rule of law on the subject in those States. But when correctly stated, it will be seen that this leaves the doctrine still wholly unqualified as a rule of substantive law. The error lies in introducing the words, “what are the indications of fraud arising from it” (i.e., the agreement), in stating the question for the jury. Omitting these words, the proposition would be: “If the agreement be not contained in the mortgage itself, the question whether there is any such agreement is one for the jury;” and this correctly represents the law in all the fourteen States where the doctrine obtains,⁴ as well as in the

¹ 70 Mo. 217.

² 5 Mo. App. 545.

³ *Ante*, sect. 138.

⁴ Virginia, New York, New Hampshire, Ohio, Illinois, Wisconsin, Minnesota, Missouri, Tennessee, Mississippi, Indiana, West Virginia, Oregon and Colorado.

courts of the United States. But in none of these courts is the question, "What are the indications of fraud arising from it?" left to the jury, whether the agreement appears from the instrument itself, or from evidence *aliunde*. It is fundamental to the doctrine of *Robinson v. Elliott*, that when the fact of the agreement is established, the strong legal sense of the court makes clear the indications of fraud which arise from it, and the judgment of the law is pronounced accordingly. In those other States, whose courts maintain the contrary doctrine,¹ and disaffirm the duty of the court to pronounce upon the fraud, the question of "the indications of fraud arising from" the agreement is one for the jury. This is the principal difference between these respective classes of courts in reference to this subject.

§ 146. The qualification examined. — But the rule, that the fact of the existence of the agreement must, in all disputed cases, be determined by the jury, cannot correctly be considered a qualification of the doctrine of substantive law applicable to the case, for it is simply a rule of procedure. No number of references to this as a rule of substantive law, can well make it other than a rule of procedure. In all disputed cases, tried before juries, the facts are to be found by the jury. The facts must be ascertained before the court can be prepared to apply the proper rule of substantive law; and the manner of ascertaining the facts is a matter pertaining to procedure only. The process adopted in the class of cases under consideration is the old and familiar one which is of general application in all cases and by all courts. The facts of the case are first to be ascertained by the trier of the facts. If the fraudulent agreement appears on the face of a written instrument, and the

¹ Michigan, Iowa, Maine, Massachusetts, Kentucky, Kansas, Alabama, and Texas.

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execution of that instrument by the party charged is a matter in issue, the fact of such execution is to be determined by the trier of the facts ; by the jury, if there be one sitting in the case as such trier, otherwise by the court. But nothing is more common than to dispense with the formality of making proof of facts not really in dispute ; a familiar instance of which often occurs in the case of a written instrument. If, then, the execution of the supposed instrument be an admitted fact (as it frequently is), there is no question for the jury to pass upon, and all the facts appear which are necessary for the application of the rule of law. In these cases, that is, cases in which the fraudulent agreement appears on the face of the instrument, it is often adjudged that the instrument is fraudulent *per se*, or “ upon its face ; ” language not descriptive of any distinct or novel rule of law, but quite pertinent when the instrument itself furnishes all the necessary evidence of the fraudulent agreement. But if such agreement does not appear upon the face of the instrument, but is disclosed by evidence *aliunde*, the fact of its existence must be found by the jury, whenever it is the jury that is the trier of the facts. If it be so found by the jury, then again, all the facts appear which are necessary for the application of the rule of law ; and the duty again devolves upon the court of declaring the fraud. In these cases, “ while the court can not pronounce the instrument fraudulent *per se*, it can and does pronounce the whole transaction fraudulent *per se*.” In both classes of cases, the process is the same ; first, the facts are established, under the exigencies of the particular case, according to the usual rules of procedure ; and then, by the application to those facts of the proper rule of law, an adjudication is reached. In the one case, the instrument alone furnishes all the facts necessary for the judgment of the court. In the other, it requires all the evidence, including the instrument, to furnish the necessary facts. To

suppose, as the courts in *Gay v. Bidwell*¹ and *Brett v. Carter*² supposed, that this judicial process is in part a resort to violent presumptions, is to misunderstand the process. Some single fact or facts may, of course, as in any controverted case, be ascertained by presumptive evidence. For instance, if the mortgager, being examined as a witness, does not deny that he executed the instrument, while the main contention is as to other matters, it may fairly be presumed that he did execute it; or if the mortgagee does not prove satisfactorily that the sales made by the mortgager were without his knowledge and against his will, it may perhaps be presumed, as it frequently has been, that he knew and assented to such sales. In such cases, the appellate court might be called on to determine whether the verdict was wholly unsupported by the evidence; but this would be a question of procedure only, the decision of which could, of necessity, have no effect upon the rule of substantive law, by qualification or otherwise; nor in case the verdict be sustained, would the criticism be either just or pertinent, that "facts not appearing upon the face of the instrument are presumed, in order to *help out this presumption of fraud.*"³ As before suggested, the judicial process in such cases is not a process of either presumption or construction; it is rather that of adjudication, by the application of a rule of substantive law to proven facts.

§ 147. The mode of proof immaterial.— It will be immaterial, then, to the question of law, whether the fraudulent agreement appear upon the face of the instrument, or be proven by other sufficient evidence. Such has in general been the view entertained by those courts in which the subject has been discussed. It is true that the leading cases in Virginia, West Virginia, Colorado

¹ 7 Mich. 519.

² 2 Low. 458.

³ Per Lowell, J., *Brett v. Carter*, 2 Low. 458.

and Mississippi, in which the doctrine has been applied, exhibited the fact of such an agreement on the face of the instrument;¹ while in the leading cases in Ohio and Oregon, the agreement was proved *aliunde*.² But in New York,³ New Hampshire,⁴ Illinois,⁵ Tennessee,⁶ Wisconsin,⁷ Minnesota,⁸ and Indiana,⁹ and in the courts of the United States,¹⁰ cases of both classes have arisen, and the adjudication of fraud, as a rule of substantive law, has been made indifferently in both. Frequently, the agreement has been found on the face of the deed, by implication.¹¹ It is difficult to see any reason for a distinction in this respect, or for the supposition that such distinction could be admitted otherwise than as a question of procedure. Indeed, the matter has been frequently referred to by the courts as one in no way affecting the question of substantive law.¹²

The ruling in *Southard v. Benner*¹³ may be here repeated

¹ *Lang v. Lee*, 3 Rand. 410; *Sheppards v. Turpin*, 3 Gratt. 357; *Kuhn v. Mack*, 4 W. Va. 186; *Bank v. Goodrich*, 3 Colo. 139; *Harman v. Hoskins*, 56 Miss. 142.

² *Collins v. Myers*, 16 Ohio, 547; *Orton v. Orton*, 7 Oreg. 478.

³ *Edgell v. Hart*, 9 N. Y. 213; *Southard v. Benner*, 72 *Id.* 424.

⁴ *Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603; *Putnam v. Osgood*, 51 N. H. 192, 52 *Id.* 148.

⁵ *Davis v. Ransom*, 18 Ill. 396; *Barnet v. Fergus*, 51 *Id.* 352.

⁶ *Bank v. Ebbert*, 9 Heisk. 153; *Nailer v. Young*, 7 Lea, 735.

⁷ *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Deuster*, 23 *Id.* 136.

⁸ *Stein v. Munch*, 24 Minn. 390; *Horton v. Williams*, 21 *Id.* 187.

⁹ *Ins. Co. v. Wilcoxson*, 21 Ind. 355; *Mobley v. Letts*, 61 *Id.* 11.

¹⁰ *Smith v. McLean*, 10 N. B. R. 260 (Miss); *Re Forbes*, 5 Biss. 510 (Ill.); *Re Kahley*, 2 *Id.* 383 (Wis.); *Re Morrill*, 2 *Sawyer*, 356 (Nev.); *Catlin v. Currier*, 1 *Sawyer*, 7 (Oreg.).

¹¹ *Perry v. Bank*, 27 Gratt. 755; *Harman v. Abbey*, 7 Ohio St. 218; *Stanley v. Bunce*, 27 Mo. 269; *Lodge v. Samuels*, 50 *Id.* 204; *Garden v. Bodwing*, 9 W. Va. 121; *Gardner v. Johnston*, 9 *Id.* 403; *Davenport v. Foulke*, 68 Ind. 382, 34 Am. Rep. 265; *Re Manly*, 2 *Bond*, 261 (Ohio); *Fox v. Davidson*, 1 *Mackey*, 102, 9 *Wash. L. Rep.* 263 (D. C.).

¹² *Edgell v. Hart*, 9 N. Y. 213; *Southard v. Benner*, 72 *Id.* 424; *Gardner v. Johnston*, 9 W. Va., 403; *Perry v. Bank*, 27 Gratt. 755.

¹³ 72 N. Y. 424.

as a most succinct statement of the *status* of the doctrine, when considered in connection with questions of procedure. "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon, that in law condemns the security, and not the fact that it is proved by the instrument of suretyship, instead of by parol or in some other way."

§ 148. Legal intent, and intent to defraud, distinguished. — In this connection it may be proper to advert to the fact that the language sometimes employed by the courts in announcing this rule of law indicates a reference to the question of intent as one fundamental to the doctrine. Fraudulent intent being always, in the very nature of the case, a question of fact, even though not made such by any statute, it is proper to submit this question to the jury, in every case where it is involved and they are the triers of the facts. If then, the critic may ask, the adjudication by the court is based in part upon the intent of the parties to the transaction, how can such adjudication be made as based on a rule of substantive law, without invading the province of the jury, and violating to some extent the right of trial by jury? This criticism, which has been sometimes made, is, it is submitted, rather verbal than substantial. It is true that, in leading cases on this subject in New York,¹ Tennessee,² Connecticut³ and Mississippi,⁴ the courts have employed the element of imputed intent in adjudicating the

¹ *Wood v. Lowry*, 17 Wend. 492.

² *Bank v. Ebbert*, 9 Heisk. 153.

³ *Bishop v. Warner*, 19 Conn. 460.

⁴ *Harman v. Hoskins*, 56 Miss. 142.

fraud. But it seems plain from a careful consideration of the expressions of these courts, in connection with the facts, that the intent imputed to the parties in these cases is by no means identical with the “*dolus*” or the intent to deceive or defraud, which is the foundation of fraudulent intent when submitted as a question of fact to a jury. It is a “*legal intent*,” in the sense of a conclusion of law. “A party will be held as intending the natural and inevitable effects of his acts; if his deed necessarily operates to interpose unreasonable hindrance and delay to creditors, or to defeat them altogether, *the intent will be a conclusion of law.*”¹ “It must be held as wanting in *legal good faith*, on the plain principle that every reasonable man is presumed to intend the probable consequences of his own acts.”² These are but variations in the mode of stating a rule of substantive law. The intent here referred to, if considered merely as a question of fact, is simply the intent to execute the instrument, or to engage in the transaction, which is found to possess such pernicious features. If this intent be found as a fact of the case, the imputations above stated follow as conclusions of law, as was expressly declared by the Supreme Court of New Hampshire, in these words: “If a trust, inconsistent with the legitimate purpose of a mortgage, is reserved for the benefit of the mortgager, and *that* is proved, then *a fraudulent intent* is, with us, and in many other jurisdictions, *a conclusion of law.*”³ But that such expressions of the courts have no reference to that “*fraudulent intent*” which is always “*a question of fact for the jury*,” and which rests on the actual motives of the party charged, is plain from the frequent declarations of the same courts, that “*there was no specific intent to defraud;*”⁴ that “*nothing more was intended*

¹ *Harman v. Hoskins*, 56 Miss. 142. ³ *Putnam v. Osgood*, 51 N. H. at p. 202.

² *Bank v. Ebbert*, 9 Heisk. 153. ⁴ *Bank v. Ebbert*, 9 Heisk. 153.

than an honest design to secure a just debt; ”¹ that “ the act, in a moral view, was entirely fair; ”² and that the arrangement was not made “ with a fraudulent scheme and purpose to defeat existing or future creditors.”³ To the same effect that the actual intent or motive of the parties is immaterial to the inquiry, and that there is no question of intent in such a case to be submitted to a jury, are frequent cases in Pennsylvania,⁴ New York⁵ and Missouri,⁶ and others in Wisconsin,⁷ New Hampshire⁸ and Indiana.⁹

§ 149. **Legal intent at common law.** — The “ legal” intent thus observed as frequently an element in modern fraud, is the same intent which was seen at an early day to be involved in the ancient “ covin,” the prototype of our modern fraud. Each of these terms, “ covin” and “ fraud,” is primarily applicable to and descriptive of, not the intent or motive of the parties to the transaction, but the inherent characteristics and quality of the transaction itself. If essentially unreal or deceptive, or having in itself fraudulent features, it may be characterized as a fraud; and there may or may not have been an intent on the part of the parties to give it that deceptive character, or to accomplish deception by means of it. Covin, according to the definition previously referred to,¹⁰ given in 1550, was “ a secret agreement determined in the hearts of two or more men, to the

¹ *Galt v. Dibrell*, 10 Yerg. at p. 155.

² *Harman v. Hoskins*, 56 Miss. 142.

³ *Hilliard v. Cagle*, 46 Miss. 309 (at p. 337).

⁴ *Welsh v. Bekey*, 1 Penn. 57; *Clow v. Woods*, 5 S. & R. 275, 9 Am. Dec. 346; *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. Rep. 588.

⁵ *Russell v. Winne*, 87 N. Y. 591; *Wood v. Lowry*, 17 Wend. 492; *Maston v. Vultee*, 8 Bosw. 129.

⁶ *State v. Tasker*, 31 Mo. 445; *Brooks v. Wimer*, 20 Mo. 503.

⁷ *Blakeslee v. Rossman*, 43 Wis. 116.

⁸ *Putnam v. Osgood*, 52 N. H. 148.

⁹ *Mobley v. Letts*, 61 Ind. 11.

¹⁰ *Ante*. sect. 121.

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prejudice of another.”¹ But this, as before suggested, did not necessarily imply an agreement to commit intentional deception, or an agreement to attempt prejudice to another. The agreement to do the act in question was the fact to be determined, and the circumstance that it would operate to the prejudice of another was what made it covinous. This appears from other views expressed by the same judge in the same case; for in answer to the contention that the complaining party must prove the intent to deceive and defraud, he said: “Inasmuch as covin is a secret thing, whereof by intendment of law a stranger cannot have knowledge, for this reason the law will not force a stranger to show the cause thereof.” It was held, also, that there might be both “covin apparent,” and “covin not apparent;” and that if the covin relied on were “covin apparent,” it might well, as a matter of procedure, be proven under a general averment of covin in the pleadings. So, in a note by Lord Hale to Coke upon Littleton, it is said: “The covin is apparent, though it was not found.”² That is to say, the facts of the case being apparent, or being found, the covin was apparent, though no intent to defraud or deceive was proved. The character of the transaction being apparent, no other intent need be proven than the intent to engage in the transaction; the law would then impute to this intent all its necessary consequences, and the result would be “covin apparent.”

It is in precise analogy to this line of thought that the American courts, in the cases above cited, have spoken of the intent to engage in the transaction complained of as a “legal intent,” in which all the possible consequences of that act were necessarily involved. And so, in a recent treatise on Chattel Mortgages, the doctrine is taught in general terms, that the intent to do an act which will have

¹ *Wimbish v. Tailbois*, Plowd. 38 (at p. 54).

² *Co. Lit.* 59a, note 4.

a fraudulent effect constitutes a legal fraud, "although neither of the parties to the mortgage had the intention of perpetrating a legal fraud."¹

§ 150. The distinction overlooked.—It was probably in intended deference to such judicial expressions concerning the legal or imputed intent in these cases, that the Supreme Court of North Carolina was led to leave the determination of the question of fraud in this class of conveyances so much to the discretion of the jury as it has done in recent cases.² Perhaps, also, similar considerations influenced the courts of Maine, Texas and Alabama in abandoning, to so great an extent as they have done, judicial opinion on the subject.³ Reflection must, however, assure the student of the principles underlying these cases, that the question of fraudulent intent, as one of fact, is not logically involved in them, the other patent facts appearing which have been before mentioned; that such judicial references to intent by no means enlarge the province of the jury, or limit the duty or responsibility of the court; and that when the facts are made clearly apparent, in whatever manner, jurisprudence has a substantive rule therefor, the application of which is demanded by both principle and policy.

§ 151. General doctrine as to legal intent.—In this respect there is neither novelty nor singularity, in either the doctrine itself or the mode of its application. In many other cases of alleged fraud in business or other transactions, similar language is used by the courts, a similar process is employed, and a similar fixed and substantive

¹ Jones on Chat. Mort., sect. 338.

² Cheatham *v.* Hawkins, 76 N. C. 335, 80 *Id.* 161; Holmes *v.* Marshall, 78 *Id.* 262; Boone *v.* Hardie, 83 *Id.* 470.

³ Googins *v.* Gilmore, 47 Me. 9; Johnson *v.* Thweatt, 18 Ala. 741; Reynolds *v.* Welch, 47 *Id.* 200; Scott *v.* Alford, 53 Tex. 82.

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rule of jurisprudence is applied. A few instances may suffice to illustrate the generality of the rule and the practice; and Michigan herself, whose courts demur to the doctrine of *Robinson v. Elliott*, furnishes one of the most clear and succinct statements of the rule. Said Chancellor Farnsworth: “By the term fraud, it should be remembered that *the legal intent and effect of the acts complained of* is meant. The law has a standard for measuring the intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the parties deny all intention of committing a fraud.”¹ And this view was re-affirmed, on appeal, by the Supreme Court, which found the transaction fraudulent, without “imputing to the highly respectable parties in this case a premeditated or wicked intention to destroy or injure the interest of the complainant.”² In Maine, also, this doctrine is distinctly announced in *Wheelden v. Wilson*,³ a case of a mortgage on goods in trade, the validity of which was questioned by an attaching creditor, but in which the question of a reserved power of sale is not considered. Said the court: “It may not have been the intention of either the mortgagee or mortgager to perpetrate a moral fraud; they may have intended to act for the benefit of all the creditors of the mortgager; but that they both intended to place the property mortgaged beyond the reach of legal process, and thereby to delay, if not to defeat creditors, we think the case clearly shows. This constitutes a legal fraud.” *Mutatis mutandis*, this precise criticism might have been applied to the same case by other courts, who would lay stress on the fact that the parties “both intended to reserve to the mortgager the potential control of the goods, and thereby to delay creditors.

¹ *Kirby v. Ingersoll*, 1 Harr. Ch. 172 (p. 191).

² 1 *Doug.* (Mich.) 477 (1844).

³ 44 Me. 11.

In New York, the rule was announced as follows: "The Statute of Frauds (*i.e.*, 13th Eliz.) refers to a legal, and not a moral intent; that is, *not a moral intent as contradistinguished from a legal intent*. It supposes that every one is capable of perceiving what is wrong, and therefore, if he do what is forbidden, *intending to do it*, he will not be allowed to say that he did not intend to do a forbidden act. A man's moral perceptions may be so perverted as to imagine an act to be fair and honest, which the law justly pronounces fraudulent and corrupt; but he is not therefore to escape from the consequences of it."¹ This doctrine, it will be observed, was announced in view of the New York statute, which, like those of Michigan, Indiana, and other States, made the question of fraudulent intent, in all cases, a question of fact and not of law. The distinction was again taken in *Goodrich v. Downs*,² that the question of intent to be left to the jury under such a statute, was a wholly different question from that of fraud which the court would find inherent in any trust conveyance reserving a benefit to the grantor. And to the same effect are the earlier case of *Cunningham v. Freeborn*³ and the later one of *Dunham v. Waterman*.⁴ In Pennsylvania, where the established rule is that retained possession alone suffices to make a conveyance fraudulent, it was suggested as early as 1809, that a legal intent was imputed in such cases, though the actual intent might be entirely wanting.⁵ The same view is apparent throughout the long line of Pennsylvania cases on the subject, having been in 1872 declared to be "elementary law in the Commonwealth," and "a rule of universal application."⁶ In Illinois, it was said of a conveyance of real estate, impeached for fraud: "It is not important

¹ *Grover v. Wakeman*, 11 Wend. 187 (at p. 225.)

² 6 Hill, 438.

³ 11 Wend. 240.

⁴ 17 N. Y. 9.

⁵ *Wilt v. Franklin*, 1 Binn. 502, 2 Am. Dec. 474.

⁶ *Garman v. Cooper*, 72 Pa. St. 32.

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what further may have been intended by Thomson and Power, if they intended Thomson should retain a secret use in the property. They may not have intended that this should hinder or delay creditors. Its legal effect, however, is to hinder and delay them, and, therefore, the conveyances are, under the statute, fraudulent and void as to creditors.”¹ In other cases, it was again said that “it is not important what *motives* may have animated the parties, if they have so disposed of the property that *the necessary effect* is to hinder and delay creditors.”² So, in Tennessee, in a case of a voluntary conveyance of land, it was said: “It will be presumed that a party intends the probable consequences of his own act.”³ And in Missouri, in a case of an assignment of goods to preferred creditors, it was said: “Every man must be presumed to intend the necessary consequences of his act.”⁴

The same views are entertained in England, where a classification of fraud is adopted, which divides it into: *First* legal fraud, in which there may be a false representation, but without any dishonest intention; and *second*, moral fraud, which rests in knowledge of the falsity, and in dishonest intention.⁵ In *Graham v. Chapman*⁶ it was said: “Every person must be taken to intend that which is the necessary consequence of his own act; and if a trader make a deed which necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent.” In *Mining Co. v. Grant*,⁷ Jessel, M. R., said: “A man may commit a fraud without believing it to be a fraud, that is, without believing it to be a fraud for which he can be held responsible in law; but the question is, what has his belief to do with it?”

¹ *Power v. Alston*, 93 Ill. 587.

² *Moore v. Wood*, 100 Ill. 451; *Phelps v. Curts*, 80 Ill. 109.

³ *Spence v. Dunlap*, 6 Lea, 457. ⁴ *Bigelow v. Stringer*, 40 Mo. 195.

⁵ *Indermaur, Principles of the Common Law*, 217.

⁶ 12 C. B. 85.

⁷ 17 Ch. D. 122.

In Spackman *v.* Evans,¹ Lord Cranworth said: "I do not attribute moral fraud to the appellant, but the whole transaction was fictitious." And in Mining Co. *v.* Smith,² Lord Cairns said: "I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they asserted that which they knew to be untrue."

It might, in view of the foregoing considerations, be a safer practice for courts to discriminate more carefully than has been habitual, in their use of the term "intent," and to distinguish in each case between an intent to deceive or defraud others, and an intent to do acts which may have a like prejudicial effect though not so intended. But whether these distinctions are or are not taken in terms in the decisions, it should not by the student be overlooked that they in fact exist. Observing them, he will more readily keep in mind the proper province of the court in all such cases, and be less likely to confound rules of substantive law with canons of procedure, or to suppose that the latter can ever, in a proper sense, qualify the former.

§ 152. **Third supposed qualification.** — What has been already said illustrates sufficiently the fallacy involved in the third supposed qualification of the doctrine.³ Whether "the mere fact that the mortgager continues to sell the mortgaged goods with the knowledge of the mortgagee" furnishes sufficient proof of an agreement between the parties for such sales, is at best but a question of evidence, and pertains to the adjective rather than to the substantive law of the subject. When so considered, the "mere fact" of course does not of itself "render the mortgage fraudulent in law." From the gen-

¹ L. R. 3 Eng. & Ir. App. 171 (at p. 189).

² L. R. 4 Eng. & Ir. App. 64.

³ See *ante*, sect. 133.

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eral process employed in adjudication, in most courts, it would be reasonable to suppose that, ordinarily, proof of a knowledge by the mortgagee of the fact of sales would afford presumptive eviaence of an agreement, and throw upon the mortgagee the burden of proving the contrary; and the ultimate fact as to such agreement would thus be determined, affirmatively or negatively, just as any other material fact would be. This process the student will find to have been employed in the class of cases in question in the fourteen States before named.¹ If the fact of the agreement be proved, the rule of law, without qualification, is applied, and the result is an adjudication of fraud in the transaction.

§ 153. Conclusions. — As a result of this examination of the questions pertaining to this branch of the law, the following general propositions may be advanced.

1. Fraudulent intent, *i.e.*, an intent to defraud, is always, *ex necessitate rei*, a question of fact, whether made so by statute or not.
2. That intent which courts sometimes call a legal intent is not identical with the former. By this is meant only the intent to do the act which is recognized as having a necessarily prejudicial effect.
3. Whatever may be the facts material to the decision of the case, they are to be ascertained according to the practice of the court; and this should be done by the jury in all jury cases. In the first named class of cases, the intent to deceive is a material fact. In the second, the corresponding material fact is the intent to do the act complained of.

4. The fact being ascertained in either of the two classes of cases above mentioned, the only proper concern of jurisprudence is to apply a definite and just rule of law to the

¹ *Ante*, sects. 114, 145.

case. This rule, when formulated, may be called a doctrine of substantive law.

5. The mode of ascertaining the facts cannot detract from, or affect by either enlargement or limitation, the rule of law. Questions as to the mode of ascertaining the facts can be no other than questions of procedure.

6. Jurisprudence, being absolutely impartial in its view of all such cases, is ready to consider every important or material fact, and, by reference thereto, to determine which rule of substantive law is applicable ; and thus to exclude the application of the rule which governs cases of fraud or fraudulent tendency, whenever the facts make that rule inapplicable.

7. In entire harmony with all well considered cases in which either of the foregoing propositions is adopted and followed, *Robinson v. Elliott* and kindred cases apply the substantive rule of law, that a reservation to the mortgager of a discretionary power of sale of the goods renders the mortgage fraudulent.

CHAPTER X.

OTHER FORMS OF FRAUDULENT RESERVATION.

SECTION 154. General principles of law applicable to several classes of cases.

- 155. The abstract rule involved in *Robinson v. Elliott*.
- 156. Different modes of reserving control of property.
- 157. Reservations of power of revocation.
- 158. Reservations of interest in real estate.
- 159. Reservations of the use of property consumable in the use.
- 160. Reservations of rights or privileges under assignments for creditors.
- 161. Reservations of power of appointment.
- 162. Summary.

§ 154. General principles of law applicable to several classes of cases. — Before the student of this subject closes his investigations, his attention should be directed to certain classes of cases, which do not fall within the category of conveyances involving a reserved power of sale, but in which there are reservations of other incidents of ownership, and which are so closely analogous that the principle of substantive law which governs them may be considered identical. If it shall appear that in the classes of cases now to be noticed, a given principle of law is applied as fundamental, and to so universal an extent that its propriety and its salutary character are practically unquestioned, it will logically follow that the same principle should be applied wherever it properly may be, in order to preserve the harmony of jurisprudence. These cases are all believed to rest upon a fundamental general principle, which is commonly regarded as an essential of modern jurisprudence. Apparently it is quite applicable to cases of mortgages on

stocks of goods with power of sale reserved; an applicability which has several times been mentioned by courts and text-writers. Apparently, too, its application to them, in distinct terms, if more generally recognized, would tend to remove many of the difficulties attending this vexed question.

It will be remembered that these difficulties largely grow out of misunderstood distinctions between substantive law and adjective law. In determining the propriety, the justice, or the applicability of any rule of substantive law, it is not important to consider, first, what is the character or frame of the action in the particular case; or second, by what sort of evidence the facts of the case are established; or third, whether an agreement to do or to allow a particular act or course of acts appears in writing, or is proven by parol; or fourth, whether the facts are ascertained by the verdict of a jury, or by the direct investigation of a court; or fifth, any other question of mere procedure; or sixth, whether or not the Legislature has achieved the supererogatory work of declaring that a question of fact shall not be considered a question of law. It is, on the other hand, proper to inquire whether, in case a certain state of facts be satisfactorily established, a certain rule, which may be stated in abstract and general terms, is reasonable, sensible, and just in itself, and ought, in consideration of the *status* and requirements of jurisprudence, to be applied as a principle fundamental to the particular case and to all similar cases. By this method, the proper distinction between the law and the facts will be kept in mind, each will be confined to its proper province, and the inherent difference between them will be so comprehended, that it will be seen that while no statute can convert one into the other, neither can any statute well assist in keeping them separate.

§ 155. **The abstract rule involved in *Robinson v. Elliott.*** — The doctrine of *Robinson v. Elliott* and kindred

cases may be re-stated as follows: that a mortgage upon a stock of goods in trade, under which the mortgager is permitted by the mortgagee to sell the goods at his discretion in the usual course of business, is inherently and essentially fraudulent as to creditors of the mortgager. The reasons for this rule have been seen to be, that such a transaction falsely pretends to be a mortgage, while in reality it is inconsistent with the idea of a security, and amounts merely to a cloak for an exercise by the mortgager of the most practical and substantial power incident to ownership, namely, the power of uncontrolled disposition. Reduced to its simplest analysis, the abstract rule may be stated thus: that *a reservation by the grantor in a pretended conveyance of property, of a power of controlling or disposing of it, is utterly inconsistent with the idea of a conveyance, and renders the pretended conveyance fraudulent and void.* As thus stated, this is a doctrine applicable to the other classes of conveyances now to be noticed, in which other incidents or attributes of ownership are reserved, and which is frequently so applied as to avoid them, with little dissent from courts, practitioners, or text-writers.

§ 156. **Different modes of reserving control of property.**—There is no variation between the salient facts of these cases and those of such cases as *Robinson v. Elliott*, which calls for any variation in the statement of this general doctrine. The variations in the facts of the several classes of cases grow out of differences between classes of conveyances, or differences in the incidents of ownership which are reserved. Conveyances of land differ, as to their form, objects and purposes, and sometimes as to parties and solemnities, from conveyances of chattels; and the variations in conveyances of different classes of chattels are numerous. So, there will be observed, first, different modes of reserving control to the grantor; second,

differences in the character of control reserved; and, third, different tests of the inconsistency of such reservations, varying according to the forms, subjects, objects and requisites of different conveyances. But under a rule stated in so general terms as those employed above, all such differences are minor and immaterial. The abstract essentials of the doctrine of *Robinson v. Elliott*, namely, a pretended conveyance by the owner of property, and an inconsistent reservation by him of control over it, are found in the classes of cases now to be observed.

These cases may, for convenience, be classified according to the character of control reserved, as follows:—

1. Reservations of power of revocation.
2. Reservations of interest in real estate.
3. Reservations of use of property consumable in the use.
4. Reservations of rights or privileges under assignments for benefit of creditors.

§ 157. Reservations of power of revocation.—In England, the doctrine was established at an early day that a reservation in a conveyance, of a power of revocation, would render the conveyance fraudulent; and the rule was applied in favor of both creditors and purchasers, and to conveyances of both lands and chattels. A somewhat common form of such conveyances was to insert a condition that, on tender of a small sum of money, the conveyance should be void; which was recognized as equivalent to an unconditional power of revocation. The statute of 27th Eliz., in favor of purchasers, contained a special reference to powers of revocation, the reservation of which was then so common.

In *Tyler v. Littleton*,¹ in 1612, in the Common Pleas, Coke, C. J., referred to a case in the King's Bench, in the 28th Eliz., in which it had been adjudged that the reserva-

¹ 2 Brownlow, 187.

tion of a power of revocation made a conveyance fraudulent as to a purchaser; and Wynch, J., remarked that if a conveyance contain a power of revocation,—which is declared to be apparent fraud by the statute (27th Eliz.),—the court may take notice of that without any averment.

The law was thus frequently declared by the courts in cases where purchasers complained.¹

Dyer cites such a case, which arose just prior to the passage of the statute 13th Eliz., in which there was a proviso that the conveyance should be void on the payment of ten shillings, and the grantor being then indebted, but continuing after judgment to secure the profits of the lands conveyed, his creditors, after the passage of that act, reached and subjected the land upon an *elegit*.² In a note to this case, Dyer cites several earlier cases, some arising in the reign of Edward III., where conveyances of land, under which the grantor reserved the profits, had been adjudged fraudulent as to creditors, thus evidencing the antiquity of this principle of law.

It would seem from this that the express provision of the statute 27th Eliz., making void as to purchasers any conveyance of lands containing a power of revocation, was but declaratory of a general principle of law, already recognized, that such a reservation is fraudulent. So the law seems to be understood by the learned author of *Chance on Powers*.³

*Bethel v. Stanhope*⁴ was a case of a voluntary gift of goods, with a condition for reconveyance on payment of twenty shillings, which was complained of by a creditor. “All the court held that this gift of the goods is in itself fraudulent, as appears by the condition.”

¹ *Standen v. Bullock*, 3 Coke, 82 b (1600); *Anon., Lane*, 22 (1606); *Garth v. Ersfeild*, J. Bridgman, 22 (1616); *Lavender v. Blackstone*, 2 Lev. 146, 3 *Keble*, 526 (1674).

² *Anon.*, Dyer, 295 *a*.

³ *Sect. 1843.*

⁴ *Croke Eliz.* 810 (43 Eliz.).

In *The King v. Nottingham*,¹ which was brought in the Exchequer to set aside a conveyance of lands made by Sir Robert Dudley, which contained a power of revocation, the case was argued for the crown upon principles applicable to conveyances fraudulent as to creditors; and Sir Walter Raleigh's Case was cited as apposite, in which, under a conveyance by him of lands, he had reserved and enjoyed the profits thereof, which had been held fraudulent; and a decision was rendered here also in favor of the crown, though the reasons therefor are not stated.

In *Tarback v. Marbury*,² it was expressly decided that the reservation of a power, in a deed of lands, to mortgage or dispose of the same as the grantor should think fit, amounted in effect to a power of revocation, and therefore rendered the deed fraudulent as to creditors. In *Peacock v. Monk*,³ Lord Hardwicke said: "If there is a power of revocation in such a deed, it is a constant evidence of fraud." In *Rock v. Dade*,⁴ in 1709, Lord Chancellor Cowper found, in a voluntary settlement for children, two powers of revocation; one, for the grantor and his wife jointly during the coverture to revoke, which was in effect the grantor's sole power, the wife being *sub potestate viri*; the other, for the grantor to revoke, if he survived his wife; all which was considered void as to creditors.

Recently, in *Smith v. Hurst*,⁵ a deed in trust, professedly made for the benefit of creditors, was discovered upon examination to be "a mere deed of management, which it was competent to Hurst (the grantor) at any time to alter or revoke;" and the vice-chancellor said that "a deed which the debtor has power to revoke, and attempts to use as a shield against his creditors, cannot be otherwise than fraud-

¹ *Lane*, 42 (1609).

⁴ Cited in *May on Fraud*. Conv. 520.

² *2 Vernon*, 510 (1705).

⁵ *10 Hare*, 30 (1852).

³ *1 Ves. sr.* 127 (1748).

ulent and void against the creditors.’’ To the same effect is *Jenkyn v. Vaughan*.¹

The authorities in America on the question of the effect of a power of revocation are few. The leading case is *Riggs v. Murray*,² in which there were five several conveyances by way of general assignment for creditors. The first contained a power of revocation; the second made new appointments and reservations; the third revoked all the grants of the second, and prepared the way for the fourth, which gave new instructions to the trustees as to their duties; the fifth made a new provision for creditors, and provided for the support of the grantors themselves for a period of time. Chancellor Kent held all these conveyances void, saying that the grantors had been “sporting with the property as their own;” that there was a necessary inference of a purpose to “hinder, delay or defraud creditors;” that “the only effect of such an assignment is to mask the property;” and said further, “that such powers of revocation are fatal to the instrument, and poison it throughout, appears to have been well established by authority.”

The reversal of this decision by the Court of Errors³ does not seem to have received the endorsement of jurists generally, if indeed, it is to be understood as detracting from the authority of the rules of law announced, which, perhaps, was not intended by the appellate court;⁴ and citations are most commonly made, both by courts and text-writers, from the opinion of the chancellor.

In *Shannon v. Commonwealth*⁵ and *West v. Snodgrass*,⁶ a sale of personal property, with a reservation to the vendee of the right to rescind the contract, was in each case held

¹ 3 Drewry, 419. (1856.)

² 2 Johns. Ch. 565.

³ *Murray v. Riggs*, 15 Johns. 571.

⁴ See *Lang v. Lee*, 3 Rand., at p. 425.

⁵ 8 S. & R. 444.

⁶ 17 Ala. 549.

fraudulent and void as to the creditors of the vendor, on the ground that this arrangement was in effect a power of revocation reserved to the latter, and therefore within the general rule above referred to.

In *Cannon v. Peebles*¹ this general rule was approved, though not applied to the case because the facts did not call for its application.

§ 158. Reservations of interest in real estate.—Frequent attempts have been made by grantors of real estate to reserve benefits to themselves, either by way of control of the estate, or receipts of its profits, or otherwise; and the courts as a rule have condemned such transactions when called on to examine them. A few instances will suffice to illustrate the subject.

In *Gibbs v. Thompson*,² the grantor of the land by a subsequent conveyance reserved to himself the power to sell the land, make deeds of the same and receive the consideration therefor; which transaction the court set aside, saying: “This power enabled Denton, if he saw proper, to make the conveyance to Thompson nugatory even as a security for the alleged debt.” In *Smith v. Conkwright*,³ the land was conveyed absolutely to a trustee, ostensibly to provide funds for the payment of the grantor’s debts, but the proceeds were to be so applied by the latter and at his discretion, which feature was held to make him “virtually and potentially the beneficiary of the trust,” and thus to render the transaction fraudulent.

In *Fisher v. Henderson*,⁴ where, under a deed of settlement of land and personal property on a wife, the grantor reserved the right to sell and dispose of the property, this was held fraudulent and void as to creditors.

¹ 4 Ired. Law, 204.

² 7 Hum. 179.

³ 28 Minn. 23.

⁴ 8 N. B. R. 175; (U. S. Court, Miss., 1873.)

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In *Donovan v. Dunning*,¹ the reservation was of the use of the land for the entire life of the grantor; and in *Coolidge v. Melvin*² there was the same reservation, with the addition of a conditional defeasance to the children of the grantors after their death. In *Mackason's Appeal*³ there was the reservation of the use of the land for life, with power of appointment as to the remainder interest; and in *Brinton v. Hook*,⁴ the settlement by the husband, for the wife's benefit, was under the trusts, first, for the use of husband and wife for life, with power of absolute disposal; second, for absolute disposal by the husband, in case he survived his wife; and third, for such persons as he might by his will appoint.

In *Hungerford v. Earle*⁵ there was, under a voluntary settlement, a reservation of fifty pounds sterling per annum to the grantor. In *Mackie v. Cairns*,⁶ *Jackson v. Parker*⁷ and *Henderson v. Downing*,⁸ the reservation was for the support of the grantor or his family for a limited period.

In *Lukins v. Aird*⁹ and *Macomber v. Peck*,¹⁰ it was for the use of the land for a limited period, free of rent.

In *Kissam v. Edmundson*,¹¹ the reservation was of one-half of the entire property conveyed to a creditor, in trust for the use of the grantor's wife and children. In *Palmer v. Giles*,¹² where the conveyance was a general assignment for creditors, the reservation was by way of excluding all those creditors who refused to receive fifty cents on the dollar in settlement.

§ 159. Reservations of the use of property consumable in the use. — While there is not an entire accord in the

¹ 69 Mo. 436.

⁷ 9 Cow. 73.

² 42 N. H. 510.

⁸ 24 Miss. 106.

³ 42 Penn. St. 330

⁹ 6 Wall. 78.

⁴ 3 Md. Ch. 477.

¹⁰ 39 Iowa, 351.

⁵ 2 Vernon, 261.

¹¹ 1 Ired. Eq. 180.

⁶ 5 Cow. 547, 15 Am. Dec. 477.

¹² 5 Jones Eq. 75.

American decisions on the subject of the reservation of the use of property, where such use is tantamount to its destruction, the majority of the courts which have considered the subject have pronounced such reservations fraudulent. With this majority are the courts of at least one State in which the rule of *Robinson v. Elliott* is not favored. The reason given is that such a reservation is a practical assertion of one of the incidents of ownership, which is inconsistent with the idea of either an absolute or a conditional conveyance of the property, and thus renders the transaction, of which it forms a part, collusive and fraudulent. Farm and plantation crops and family supplies are the articles which most commonly form the subject of such reservations.

In *Darwin v. Handley*,¹ the Supreme Court of Tennessee thought the reservation of the use of property consumable in the use was *prima facie* fraudulent, "a badge of fraud so strong as to be almost conclusive, not as a matter of law, but of fact with the jury, that the deed was fraudulent." But in *Sommerville v. Horton*,² it was declared that a reservation of use of property of a nature to be consumed and exhausted in the use was not only *prima facie* fraudulent, but "merely colorable, and void, because in fact it had no operation," and the use of such property (which was provisions) "was its destruction." To the same effect is *Simpson v. Mitchell*.³ Such a conveyance was in *Wade v. Green*⁴ held good as between the parties, though it would be bad as to creditors. The rule does not apply to any particular kind of property, as such; but the test is whether the property conveyed with such a reservation is, under the circumstances of the particular case, necessarily consumable in the use.⁵

¹ 3 Yerg. 502.

³ 8 Yerg. 416.

² 4 Yerg. 540 (1833), 26 Am. Dec. 242.

⁴ 3 Hum. 546.

⁵ *Ross v. Young*, 5 Sneed, 627; *Masson v. Anderson*, 3 Bax. 290.

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In *Richmond v. Crudup*¹ an attempt was made to distinguish between an agreement for the use of such property, made as one of the terms of an absolute sale, which would render it void *per se*, and a similar agreement made subsequently and in addition to a deed in trust, which it was thought would be only *prima facie* fraudulent, as in *Darwin v. Handley*. The case of *Charlton v. Lay*² enforces and applies this distinction. The deed in that case not containing such a reservation on its face, the question of fraud was one for the jury.

In Massachusetts, this principle appeared in a *dictum* in *Shurtleff v. Willard*,³ to the effect that "there may be chattels so transient in their existence, or of such a nature, their only use consisting in their consumption, that they cannot be mortgaged;" for which *Sommerville v. Horton* was cited as an authority. The point was decided in *Robbins v. Parker*,⁴ where there was a mortgage of hay, grain, and produce on a farm, with proof that the mortgager used and consumed the property with the knowledge of the mortgagee; which was held to be "collusive and fraudulent against creditors," again citing as authority *Sommerville v. Horton*.

It will be observed that while in Tennessee, the courts place upon the same basis the reservation of the right to sell and dispose of property mortgaged and the reservation of the use of the property to exhaustion, Massachusetts sustains one class of cases and condemns the other. But in New Hampshire, where the appellate court had to consider a case of a reserved power of sale of mortgaged goods, in *Putnam v. Osgood*,⁵ the Massachusetts case of *Robbins v. Parker* was considered an authority in point.

¹ *Meigs*, 581, 33 Am. Dec. 161.

⁴ 3 *Metc.* 117.

² 5 *Hum.* 495.

⁵ 51 *N. H.* 192 (at p. 200).

³ 19 *Pick.* 202.

*Cutting v. Jackson*¹ was a case of a sale of cattle and hay, the property remaining with the vendor for his use, and the cattle consuming the hay, and the transaction was adjudged fraudulent.

In *Farmers' Bank v. Douglas*² the court, having such a mortgage before it, said: "The mortgaging of property, the use of which involves its consumption, is an evidence of fraud, not indeed conclusive, but of much weight. Unless it be explained satisfactorily, it must cause the condemnation of the instrument; and it imposes the burthen of proof upon those claiming under such instrument; and when the right to use it is also reserved in the mortgage itself, it is fraudulent upon its face."³ Proceeding then to consider the facts of the case at bar, the court found it "manifest that the object was not to apply these things to the payment of the debts, but to secure the debtor in their possession and enjoyment," and thus adjudicated: "The reservation in the conveyance of so much of these articles as was necessary for the support of the property puts an impress of fraud upon it, from which there is no escape. It was a direct benefit secured to the debtor at the expense of his creditors, which the law does not sanction."⁴

The cases in Virginia are not entirely harmonious. The general doctrine was stated in a late case⁵ to be, that the reservation of the use of property consumable in the use, such as the crops and provisions on a plantation, furnishes only an indication of fraud, but does not conclusively establish it. In that case and another,⁶ it was thought the grain conveyed might have assisted in maintaining the stock, and thus have indirectly benefited the creditor and not the

¹ 56 N. H. 253.

³ p. 540.

² 11 S. & M. 469.

⁴ p. 541.

⁵ *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

⁶ *Sipe v. Earman*, 26 Gratt. 563.

debtor; and in still another,¹ stress was laid on the circumstances that the property conveyed in the particular case was not necessarily consumable, and also that the amount of consumable property was inconsiderable. But in one case,² the court, while "recognizing the binding authority" of such cases, held the conveyance in question to be fraudulent, laying stress on the fact that it embraced "large quantities of property consumable in the use, and which must be used within the two years to be of any value," as sufficient to condemn the transaction. Thus there appears to be in this State a disposition to tolerate reservations of this kind, provided the grantor is careful not to reserve too much; though the reservation may be urged upon the attention of a jury as a badge of fraud.

Similarly, it was thought in North Carolina, in *Dewey v. Littlejohn*,³ that where the use of the crops was such that thereby the stock conveyed could be kept together, the deed was not fraudulent in law.

In Alabama, such a mortgage was in *Wiley v. Knight*⁴ held fraudulent as to creditors, irrespective of the question of intent, and *Farmer's Bank v. Douglas* was expressly approved as an authority. But in two earlier cases⁵ it was thought otherwise, because the use and consumption of the produce on the farm might, by the cultivation of the land, assist in producing additional assets.

§ 160. Reservations of rights or privileges under assignments for benefit of creditors.—The general subject of reservations by assignors under assignments for creditors is a prolific one; and it has been so fully treated by the text-writers,⁶ that a few only of the multitude of cases

¹ *Cochran v. Paris*, 11 *Gratt.* 348.

² *Quarles v. Kerr*, 14 *Gratt.* 48.

³ 2 *Ired. Eq.* 495.

⁴ 27 *Ala.* 336.

⁵ *Ravisies v. Alston*, 5 *Ala.* 297; *Elmes v. Sutherland*, 7 *Id.* 262.

⁶ For a full exposition of the subject, see *Bishop's Burrill on Assts.*, ch. 11; *Bump. on Fraud. Conveyances*, ch. 14, 15.

will be referred to here; sufficient in number to direct attention to the feature of attempted control by the assignor, which is their point of resemblance to the cases already examined.

*Burd v. Smith*¹ presented the case of an assignment for creditors, with a reservation that the assignee, in case certain of the creditors would not accept their respective portions within nine months, should pay those portions to the assignor, for the ostensible purpose that he himself might therewith settle with such creditors. This was held void on its face. The court discriminated between the fraud which rests in intent, and the fraud which inheres in a fraudulent transaction, irrespective of intent, in these incisive terms: “The facts * * * constitute a legal fraud, so as to vitiate and destroy the act, without criminalizing the agent.”

In the leading case of *Wakeman v. Grover*,² the assignment provided for payments, first, to certain preferred creditors; second, partially to such as would release the assignor in full; third, to another preferred class; and, fourth, if there was any surplus, to the assignor. Such extensive reservations by the grantor were held to make the transaction fraudulent. On appeal, under the name of *Grover v. Wakeman*,³ this assignment was declared void because of the reservation named in the second clause above stated.

In *Boardman v. Halliday*,⁴ the reservation to the assignees of power to give future preferences among the creditors was held to be quite as fraudulent as if the reservation had been to the assignor himself. To the same effect is *Barnum v. Hempstead*.⁵ In *Armstrong v. Byrne*,⁶ the assignment broadly cut off all creditors who did not release within a

¹ 4 Dallas, 76 (1802).

⁴ 10 Paige, 223.

² 4 Paige, 28.

⁵ 7 Paige, 568.

³ 11 Wend. 187.

⁶ 1 Edw. Ch. 79.

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certain time, which was characterized as being to the assignor's personal advantage, by hindering and delaying his creditors, if not otherwise. So it was held also in *Lentilhon v. Moffat*,¹ of a reservation to the assignor of power, in case certain creditors should not accept and release their debtor within sixty days, to appoint the proceeds not thus accepted to such of the creditors as he saw fit. In *Austin v. Bell*,² there was a broad reservation that the shares of such creditors as might refuse to execute releases should revert to the assignors; which, the court said, placed the property of the assignors "at their absolute disposal, to apply to their own use, or to pay to their creditors, as they pleased;" a reservation of control which made the idea of a security for creditors ridiculous. In *Riggs v. Murray*,³ the reservation was of a power to appoint new trustees. In *Hyslop v. Clarke*,⁴ it was not merely a preference to certain creditors which proved fatal; it was a reservation by the assignors of the right to make and declare future preferences, which amounted to retaining potential control over the property.

In *Pierson v. Manning*,⁵ the assignment, preferring creditors, provided that all the personality assigned must first be exhausted and applied to payment of debts, before the real estate should be resorted to, unless by consent of the assignor. This was held to be the reservation of a right to control the trustees in relation to a sale of the realty, and therefore fraudulent and void as to creditors not preferred. In *Atkinson v. Jordan*,⁶ the assignment excluded creditors not releasing the assignor within ninety days. In *Sangston v. Gaither*,⁷ there was a reservation of the surplus after paying the preferred creditors. In *Green v.*

¹ 1 Edw. Ch. 451.

⁵ 2 Mich. 445.

² 20 Johns. 442, 11 Am. Dec. 297.

⁶ 5 Ohio, 293, 24 Am. Dec. 281.

³ 2 Johns. Ch. 565.

⁷ 3 Md. 40.

⁴ 14 Johns. 458.

Triebel,¹ the fatal feature was an unnecessary delay, for perhaps an indefinite time, the grantor retaining in the meantime full use of the property. In *Grimshaw v. Walker*,² releases were exacted as a condition of participation, and the surplus was reserved to the assignor. In this case, as in many others of those cited, the court in its opinion illustrated clearly the vice inherent in such a reservation, by an insolvent debtor, of the power "to place his property beyond the legal pursuit of his creditors," and at the same time to impose conditions upon their sharing in its proceeds.

One of the clearest expositions of this class of fraud was given in an early Pennsylvania case,³ by Brackenridge, J., who, speaking of the features of such conveyances above referred to, said: —

"It has been left to the *astutia Americana* of debtors, to devise such a warehousing of effects out of the hands of the law for a time, for the benefit of particular creditors. I think it to the let and hindrance of creditors, and that such disposition is void both at common law and by statute; though not fraudulent in fact in the particular case, yet fraudulent in law, and therefore void. It is not simply the surrender of his property as satisfaction *pro rata* of his debts, that the insolvent here has in view. He couples an interest for himself in obtaining a discharge from that proportion of the respective debts which may remain unsatisfied. It is taking an undue advantage of the situation of a creditor, to impose this condition. It is immoral to exact it. *Volenti non fit injuria* if the creditor accepts, but it is making a volunteer by compulsion, and is in fact a robbery. One enlightened on the principles of moral honesty would never think of it." This opinion was cited and approved by Chancellor Walworth in *Wakeman v. Grover*.⁴

¹ 3 Md. 11.

² 12 Ala. 101.

³ *Lippincott v. Barker*, 2 Bin. 174 (at p. 191), 4 Am. Dec. 433.

⁴ 4 Paige, 28.

Somewhat like the foregoing cases are those of reservations under conveyances to a favored creditor; as in Wilson and Wormal's case,¹ which was an assignment of goods to one creditor, reserving an interest in the surplus over that creditor's debt, of which it was said, "this assignment is altogether void, because it is fraudulent in part." In *Passmore v. Eldridge*,² under a conveyance of personal property, the jury were instructed that if there was a reservation of a part of the property to the benefit of the grantor, this would be fraudulent and void. In *Lang v. Stockwell*,³ the reservation, under a conveyance of a horse and wagon, of the use for an unlimited time, was declared to be a legal fraud. In *Sparks v. Mack*,⁴ under a sale of a stock of goods to a favored creditor, the grantor reserved an interest, which made the transaction fraudulent.

§ 161. Reservations of power of appointment. — Still another class of cases, namely, those involving the exercise of a general power of appointment, as to either real or personal property, will be found on examination to resemble very closely those above referred to. They are to be distinguished by this feature, that the rule is applied alike, whether the donee of the power has been made such by another person, or by a reservation originally made in a conveyance or settlement by himself; or, in other words, it is immaterial whether the property over which he exercises the power was originally owned by himself, or by another. Therefore, as the element of original ownership is not always present, the grant of such a power is not to be classed solely among reservations by grantors. But the essential feature of these cases being that the power granted, as to the vestiture or the use of property, is equivalent to that right or control over property which appertains to absolute ownership,

¹ Godbolt, 161, (1610.)

³ 55 N. H. 561.

² 12 S. & R. 198.

⁴ 31 Ark. 666.

the theory is that such a right, wherever it may have originated, is when exercised the equivalent in all respects of absolute ownership. Thus it logically follows that, as to all creditors of the person exercising such power, the property so controlled is his own property and is subject to his debts.

The distinction is taken in these cases that there must have been an exercise of the power by the donee of it, in order to put the property within reach of his creditors. The mere grant of the power is not sufficient, though it be a general power, for it may be revoked, or it may never be exercised ; it is then like an offer of property, not accepted ; and certain essential features of ownership are lacking. But if the power be so general as to authorize the appointment to the donee himself or to his heirs, and he exercise such power, he is in an enjoyment of the property not inferior to that which an absolute owner may exercise, and his creditors would be defrauded if they could not reach and appropriate it.

Sir Edward Sugden, in his treatise on Powers,¹ states the rule for these cases as follows : “ The beneficial interest a man takes under the execution of a power forms part of his estate, and is, according to the nature of the property, subject to his debts like his other property ; nor indeed can an appointment be made so as to protect the funds from the debts of the appointee. But equity goes a step farther, and holds, that where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in preference to the claims of his legatees or appointees.” In Kent’s Commentaries,² the rule is stated in almost the same terms. In Chance on Powers,³ it is said :

¹ v. 2, p. 27.

² v. 4, p. 339.

³ v. 2, sect. 1817.

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“A power is not property; * * * if, however, the donee see fit to execute his power, thus assuming a dominion over the property, it may be thenceforth regarded as a part of his estate, and as such subject, at least in equity, to the claims of his creditors.”

The views of Lord Chancellor Hardwicke were expressed as follows in *Bainton v. Ward*:¹ “Where there is a general power given or reserved to a person, for such uses, intents and purposes as he shall appoint, this makes it his absolute estate, and gives him such a dominion over it as will subject it to his debts.” In this case Ward, having a power to charge his wife’s estate with a sum not exceeding two thousand pounds, by his will devised the same, and died in debt to the plaintiffs; and the lord chancellor held the sum devised to be subject to the debts of the testator as his personal assets. The same rule was applied by Lord Hardwicke to similar states of facts, in *Pack v. Bathurst*,² *Troughton v. Troughton*³ and *Townshend v. Windham*;⁴ in which last named case the power of appointment had been executed in favor of the testator’s daughters, which Lord Hardwicke held to be a voluntary conveyance, saying, “A man actually indebted, and conveying voluntarily, always means to be in fraud of his creditors as I take it.”⁵ These decisions follow the earlier cases of *Thompson v. Towne*,⁶ *Lassells v. Cornwallis*⁷ and *Hinton v. Toye*,⁸ in each of which, property so placed at the disposal of a party, who assumed control of it, was held to be his property. In *Ashfield v. Ashfield*,⁹ a party had settled property upon trustees, in trust for such persons or uses as he should by deed or will appoint, and in default of appointment, in

¹ 2 Atk. 172 (1741).

⁶ 2 Vernon, 319 (1694).

² 3 Atk. 269.

⁷ 2 Vernon, 465 (1704.)

³ 3 Atk. 656.

⁸ 1 Atk. 465 (1739.)

⁴ 2 Ves. sr. 1

⁹ 2 Vernon, 287.

⁵ p. 11.

trust for himself or his representatives; which was held to leave him in equity still the owner of the property, so it was subject to his debts. This doctrine is stated in all these cases as a rule of positive law. It was recognized as such, by Lord Eldon, in *George v. Milbanke*.¹ It was applied and enforced in *Attorney General v. Staff*,² in the Exchequer, by charging with probate duty property which had been conveyed by the testamentary exercise of such a power. So in *Goodtitle v. Otway*,³ it was held that a power of disposition by will gives an absolute fee in real estate.

This rule was enforced in *Johnson v. Cushing*⁴ and *Tallmadge v. Sill*,⁵ where the power of appointment could be exercised only by will, but it having been so exercised, the principle applied; the court saying in the former case, "We see no reason to gainsay the soundness and justice of it;" and stating it in the latter case in these words, "that the absolute power of conveying or disposing of property, for one's own benefit, makes the person to whom it is given the owner; the power of absolute and beneficial control cannot and ought not to be separated from the ownership."

In the late case in New York,⁶ the rule, receiving assent as a common-law rule, was held to have been abolished by the Revised Statutes.

These cases have not, as a rule, been based upon considerations applicable to fraud in conveyances. Generally originating in equity, it has been found sufficient to apply to them the equity rules usually invoked in favor of creditors who seek to reach assets of their debtors. It is plain, however, that the attempt to exercise such a power in defiance of creditors would operate a fraud upon them, in the same manner as would any of the reservations treated of in this chapter. As has already been seen, Lord Hard-

¹ 9 Ves. jr. 190 (1803).

² 2 Cromp. & Mees. 124.

³ 2 Wilson, 6.

⁴ 15 N. H. 298, 41 Am. Dec. 694.

⁵ 21 Barb. 34.

⁶ *Cutting v. Cutting*, 86 N. Y. 522.

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wicke in one such case adverted to the matter of fraud upon creditors as an element properly to be considered. In one American case¹ it was said by the court: “*Under-taking to exercise a power which authorized him to appropriate the property to the payment of his creditors, by a mere gift or legacy without making provision for them, is a fraud upon them.*”

§ 162. Summary.—In all the cases of reservations by grantors, discussed in this chapter, the courts have found the element present of an attempted control by the grantor over the property conveyed, inconsistent with the conveyance, and consistent only with the idea of a continued ownership, to some extent if not absolutely, by the grantor. The harmony of jurisprudence can be preserved, in such cases, only by treating the property thus dealt with as the property of him who thus reserves control over its disposition. This rule of substantive law has been admirably condensed by Mr. Bump, in these words: “*Absolute power of disposition is substantial ownership; but liability for debts is an inseparable incident of ownership.*”²

This is an accurate statement, from one point of view, of the salient feature of such cases as *Robinson v. Elliott*, and the principles of law applicable thereto. The reservation, by a mortgager, of the discretionary power of sale or disposition of the goods mortgaged, is a reservation of one of the most essential and potential features of ownership. A power of revocation, a power to consume by use, or a power to exercise any other species of control over the property, can scarcely be a greater interference with the rights of creditors than a power to sell; indeed, any reason which condemns any of these reservations of other powers

¹ *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694.

² Article, 4 Cent. Law. Jour. 219.

seems to apply with even greater force to the reserved power of sale.

The inconsistency being apparent, shall the transaction be held positively fraudulent? It is so held in the classes of cases referred to in this chapter. As already seen, it is so held by the majority of the American courts in cases presenting a reservation of a power of sale of mortgaged goods. The language in which these courts have generally characterized all such transactions, as heretofore quoted, may be supplemented by that of a learned writer, whose doubts in reference to reservations of a power of sale do not extend to the classes of reservations referred to in this chapter. Speaking of "Trust Assignments in the Nature of Mortgages," he says that "such an assignment, with *any reservation by the debtor for his own use or benefit in any way, is fraudulent per se, and absolutely void*; it is also void if it leaves the property *to any extent under the control of the debtor or of his assignee.*"¹

It is by the application of the precise principles of substantive law thus expressed, that *Robinson v. Elliott* and kindred cases have condemned mortgages on stocks of goods, with power reserved to the mortgager to make discretionary sales in the usual course. Stated comprehensively, these principles are:—

First: Such a reservation is inconsistent with the idea of a conveyance for the benefit of a creditor.

Second: It being consistent only with absolute ownership, the property to which the reserved power applies remains subject to the grantor's debts.

Third: The pretence that a conveyance with such a reservation is a real security, is in itself a fraud, which condemns the conveyance, and requires that it be set aside at the suit of a complaining creditor.

¹ Jones on Chat. Mort., sect. 352.

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